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In The
Supreme Court of the United States

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ANTHONY ROGERS, RICHARD MORALES,
VENTURA CALDERON, JR., ANDREW L. ALMAZAN,
ROBERT J. DELEON, ROLANDO CESAR GARZA,
ROBERT A. GEARHART, ISIDRO MEDINA, JR.,
TIMOTHY L. MENCHACA, EMILIO M. MONTES,
BRUCE R. MOORE, NATHANIEL OAKMAN,
ANTONIO RIVAS, JEFFERY J. ZAVALA,
AND GEORGE W. RANDALL,

Petitioners,

vs.

CITY OF SAN ANTONIO, TEXAS,

Respondent.

◆

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

◆

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does § 4316(b) of the Uniform Services Employment and Reemployment Act of 1994, 38 U.S.C. §§ 4301 *et seq.* (USERRA), which states that military reservists absent to perform reservist training are entitled to the same rights and benefits as non-reservists absent for other types of leave, ensure that reservists receive the same benefits as non-reservists absent for both involuntary and voluntary leave, such as vacation, or is its guarantee of equality of benefits limited to involuntary leave?

2. Does § 4311(a) of USERRA, the anti-discrimination provision, apply to non-seniority benefits, or are these type of benefits governed exclusively by the provisions of § 4316(b), so that if an employer does not provide non-reservists with the opportunity to make up opportunities to work overtime hours or at a higher classification which they missed while they were absent, the employer has no obligation to extend those opportunities to reservists when they return from training?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners are: Anthony Rogers, Richard Morales, Ventura Calderon, Jr., Andrew Almazon, Robert J. Deleon, Rolando Cesar Garza, Robert A. Gearhart, Isidrio Medina, Jr., Timothy L. Menchaca, Emilio M. Montes, Bruce R. Moore, Nathaniel Oakman, Antonio Rivas, Jeffrey J. Zavala, and George W. Randall, all individual citizens of the United States, residing in the Western District of Texas. Petitioners were the plaintiffs in the District Court and the appellees in the Fifth Circuit Court of Appeals.

Respondent

The City of San Antonio, Texas, is a governmental entity. Respondent City of San Antonio was the defendant in the District Court and appellant in the Fifth Circuit Court of Appeals.

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The Fifth Circuit opinion is reported at *Rogers, et al. v. City of San Antonio, Texas*, 392 F.3d 758 (5th Cir. 2004). Appendix 1-31. The district court opinion is reported at *Rogers, et al. v. City of San Antonio, Texas,* 211 F.Supp.2d 829 (W.D. Texas 2002). Appendix 32-69. The Fifth Circuit order denying the timely petition for rehearing and rehearing *en banc* is at Appendix 70-71.

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JURISDICTION

The Court of Appeals for the Fifth Circuit entered its judgment on December 2, 2004. Petitioners Anthony Rogers, *et al.*, respectfully petition for a writ of certiorari to review this decision. The Fifth Circuit entered an order denying a timely petition for rehearing and rehearing *en banc* on January 27, 2005.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves provisions of the Uniform Services Employment and Reemployment Act of 1994, 38 U.S.C. §§ 4301 *et seq.* (USERRA).

38 U.S.C. § 4301 provides, in pertinent part:

Purposes; sense of Congress

(a) The purposes of this chapter are –

(1) to encourage noncareer service in the uniformed services by eliminating or minimizing

the disadvantages to civilian careers and employment which can result from such service;

(2) to minimize the disruption to the lives of persons performing services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and

(3) to prohibit discrimination against persons because of their service in the uniformed services.

38 U.S.C. § 4303, provides, in pertinent part:

Definitions

(2) The term "benefit", "benefit of employment", or "rights and benefits" means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

38 U.S.C. § 4311 provides, in pertinent part:

Discrimination against persons who serve in the uniformed services and acts of reprisals prohibited

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service

> in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

38 U.S.C. § 4316 provides, in pertinent part:

Rights, benefits, and obligations of persons absent from employment for service in a uniformed service

(b)(1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be –

(A) deemed to be on furlough or leave of absence while performing such service; and

(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.

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STATEMENT OF THE CASE

The petitioners are fifteen military reservists[1] who are employed by the City of San Antonio Fire Department as firefighters or paramedics. They filed suit on October 4, 1999, claiming that the City discriminates and denies them benefits in violation of the Uniform Services Employment and Reemployment Act of 1994, 38 U.S.C. §§ 4301 *et seq.* (USERRA), when they are absent from work to fulfill reservist training obligations. The reservists' absences are for inactive duty training and service commitments, such as the minimum requirements of drilling one weekend a month and annual training for two weeks a year, as opposed to active duty "call ups" and deployments. *Rogers,* 392 F. 3d at 761. The reservists take military leave[2] or their own vacation leave in order to fulfill their training requirements. *Rogers,* 211 F.Supp.2d at 841.

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[1] The petitioners include reservists in all branches of the United States military reserves and the National Guard; they are referred to collectively as reservists. *Rogers,* 392 F.3d at 760.

With respect to this petition, the City's policies penalizing the reservists for these absences fall into two general categories: 1) treating absences for reservist service worse than absences for vacation or other voluntary leaves for the purpose of an employee's entitlement to certain benefits and 2) refusing to allow reservists who miss opportunities for working overtime or upgrading to a higher rank in the Fire Department to make up opportunities for working these hours upon their return to work.

Regarding the first category of policies, all City firefighters have nine (9) hours of scheduled overtime built into their twenty-one (21) day work cycle, for which they receive overtime pay. *Rogers*, 211 F.Supp.2d at 840. In Fire Department parlance, this is referred to as "FLSA overtime," in reference to the federal statute requiring the payment of overtime when hours exceed a certain statutory maximum. *See* § 207(k) of the Fair Labor Standards Act, as amended, 29 U.S.C. §§ 201 *et seq*. (FLSA). Ordinarily, a firefighter would have to be present and actually work the hours in order to receive overtime pay. *Rogers*, 211 F.Supp.2d at 840.

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[2] Both Texas law and City policy provide that a reservist receives fifteen days (for firefighters, seven and one-half (7½) shifts) of paid military leave per year. *Rogers,* 392 F.Supp.2d at 841, n.84.

The City and the firefighters' union, though, have negotiated significant modifications of the requirement for presence at work so that firefighters taking vacation and other types of leave[3] can still receive FLSA overtime under certain circumstances. *Id.* Under the collective bargaining agreement, the overtime which a firefighter loses when he is absent for vacation is capped at twenty-seven (27) hours per year (three work cycles with nine (9) hours of overtime per cycle). *Id.* This "three strikes, you're in" rule is designed to blunt the negative effect of vacation-related absences and treat the vacationing firefighter as if he were present at work. *Id.*, 211 F.Supp.2d at 841.

In contrast, absences due to military leave are excluded from the cap on lost FLSA overtime. *Id.* Additionally, a reservist's use of military leave in the same work cycle as vacation leave disqualifies the **vacation leave** from counting towards the twenty-seven (27) hour cap. *Id.* "Accordingly, when a reservist is forced to use vacation leave in the same FLSA cycle as military leave, either because the reservist is using his own vacation leave so that he will have enough time off to fulfill a training requirement, or because his military duty happens to fall in the same cycle as his pre-scheduled vacation, he loses the benefit of the cap." *Id.*

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[3] In addition to regular vacation leave, bonus day leave, perfect attendance leave, vacation leave used as Family Medical Leave Act leave, and floating vacation shifts all count towards the 27 hour cap. *Rogers,* 392 F.Supp.2d at 840-841.

Other provisions in the collective bargaining agreement treat non-reservists out on vacation as if they were present at work for the purpose of earning extra paid time off ("bonus days") and flexibility on taking leave ("perfect attendance leave"); a reservist's absences for more than fifteen (15) days of military training, however, disqualifies him from such benefits. *Id.*, 211 F.Supp. 2d at 846-847.

With respect to the second category of City policies at issue in this petition, firefighters and paramedics also have opportunities to work **unscheduled** overtime. *Id.*, 211 F.Supp. 2d at 844-846. If a reservist is not available to work these hours because he is off on leave, he is treated as if he refused the opportunity and bypassed on the overtime eligibility list. *Id.* He is not allowed to make up the lost opportunity and work the hours upon his return. *Id.* Similarly, if he misses opportunities to work at a higher classification and receive the on-the-job training and increased pay which performing at a higher rank entails, he is not allowed to make up those hours. *Id.*

In the district court, the parties agreed to bifurcate the case as to liability and damages. *Rogers*, 392 F.3d at 761. The parties stipulated to the material facts regarding the policies and practices at issue and filed cross-motions for summary judgment. *Id.* On March 28, 2002, the district court granted partial summary judgment on liability to the reservists and denied the City's cross-motion. *Rogers,* 211 F.Supp.2d at 848. On March 4, 2003, the district court granted the plaintiffs a second partial summary judgment on the issue of the limitations period to be applied to the reservists' claims. *See Rogers, et al. v. City of San Antonio,* No. C.A. 99-CV-1110-OG, 2003 WL 1571550 (W.D. Tex. March 24, 2003).[4]

On March 24, 2003, the district court entered an order granting the City's motion to certify a permissive appeal from these interlocutory orders under the provisions of 28 U.S.C. § 1292(b). *Rogers,* 392 F.3d at 761. On May 27, 2003, the Fifth Circuit granted permission to appeal.

On December 2, 2004, the Fifth Circuit reversed and rendered the district court's decision in the reservists' favor with respect to certain benefits, and reversed and remanded on others. *Id.* at 771-772. The Fifth Circuit rejected any application of USERRA's anti-discrimination provision, § 4311(a), and ruled that the reservists' claims were governed exclusively by the provisions of § 4316(b), which addresses non-seniority benefits. *Id.* at 769-771. Applying § 4316(b), the court found that it is acceptable to treat vacation absences more favorably than military absences on the basis that vacation is voluntary and training is not. *Id.* at 767, 771-772. It therefore rejected any comparison between military leave and voluntary leave and reversed and rendered as to these claims. The court remanded for further proceedings the claims pertaining to the variety of involuntary leaves which the City also treats more favorably than military leave, *e.g.*, jury duty and bereavement leave, since it determined that those could be comparable to military leave. *Id.* at 771-772. The court reversed and rendered on the reservists' claim that they should be allowed to make up missed opportunities to work overtime hours or in a higher rank on the basis that firefighters out on non-military leave were not extended such opportunities.[5] *Id.* at 771.

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[4] The limitations issue is not the subject of this petition. The Fifth Circuit affirmed the district court's judgment that a four year statute of limitations should be applied to the reservists' claims. *Rogers*, 392 F.3d at 773.

On January 27, 2005, the Fifth Circuit denied the reservists' petition for rehearing and rehearing *en banc.*

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REASONS FOR GRANTING THE PETITION

1. There is a split in the circuits regarding the rights and benefits afforded to absent reservists under USERRA.

The issues raised in this case are of exceptional importance because there is a split in the circuits regarding the rights and benefits afforded to absent military reservists under USERRA. These questions arise at a time when reserve components comprise forty-six percent (46%) of the United States' military manpower, and are increasingly relied upon in our military operations around the world. *See* National Committee for Employer Support of the Guard and Reserve, http://www.egsr.org. National Guard and Army Reserve soldiers make up nearly forty percent (40%) of the troops in Iraq alone. Eric Schmitt, *Guard Reports Serious Drop in Enlistment*, N.Y. Times, December 17, 2004, at A1. All those reservists have to fulfill the training obligations every year which require them to be absent from their regular jobs. "The essence of reserve duty in this context is absence from work." *West v. Safeway Stores, Inc.*, 609 F.2d 147, 149 (5th Cir. 1980). This case determines the extent to which they will be protected from the adverse consequences of their absences.

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[5] The court also ruled against the reservists on their claim involving straight-time pay, and one individual reservist's claim involving individualized discriminatory treatment, although the district court had reserved these claims for determination at trial. These claims are not the subject of this petition.

According to USERRA § 4316(b),[6] reservists and other service people protected by the statute are "entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who on furlough or leave of absence . . . " Contrary to other circuits, as well as the clear language of this and other USERRA provisions, the Fifth Circuit has narrowed USERRA's guarantee of equal treatment by determining that reservists are entitled to the employment benefits which only employees away on other involuntary leaves receive, rather than those available to employees absent for both involuntary and voluntary reasons, such as vacation.[7]

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[6] The Fifth Circuit erred in its rejection of USERRA § 4311(a) as a basis for relief, a decision with particular implications for the petitioners' claims that USERRA requires that they be allowed to make up overtime and upgrading opportunities they miss while training. *See* discussion *infra* pp. 17-22. Of course, if the Court were to determine that § 4311(a) applies, then it would operate to prohibit the City's unequal treatment of reservists and non-reservists out on voluntary leaves. However, even if § 4316(b) provides the only grounds for relief, the Fifth Circuit's decision limiting the scope of § 4316(b)'s protection to other involuntary leaves is wrong and should be reversed.

[7] Under the facts in this case, the distinction adopted by the court means that the reservists cannot count their training absences towards the twenty-seven (27) hour cap on lost FLSA overtime to the same extent as firefighters on vacation or otherwise voluntarily absent from work, that the reservists cannot count their **vacation** absences towards the twenty-seven (27) hour cap if they use military leave in the same work cycle, and that the reservists cannot qualify for bonus days and

(Continued on following page)

In *Waltermyer v. Aluminum Company of America* (*ALCOA*), 804 F.2d 821 (3rd Cir. 1986), a case decided under § 2021(b)(3), the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §§ 2001, *et seq.* (VRRA), the predecessor to USERRA, the Third Circuit found that a reservist was entitled to the same benefits provided to employees absent for vacation. Like the instant case, *Waltermyer* involved a collective bargaining agreement under which the employer paid benefits – holiday pay – to employees absent for other reasons, such as scheduled vacation, but declined to pay reservists. Following this Court's admonition in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 561 (1981) that VRRA's prohibition of discrimination did not require "employers to provide special benefits to employee reservists not generally made available to other employees," the court still determined that if an employer extended special benefits to employees out on other types of leave, then it must extend them to reservists as well. The Third Circuit recognized that "relieving those on military leave from the work requirement merely establishes equality for National Guardsmen and reservists, not preferential treatment." *Id.*, 804 F.2d at 825.

While the Fifth Circuit purported to follow *Waltermeyer* in its decision to significantly limit the "standard against which the [reservists'] claims are to be measured," **it did not**. *Id.*, 804 F.2d at 825. Specifically, the Fifth Circuit excluded voluntary leave; *Waltermyer* included it. The Fifth Circuit made a critical misconstruction of *Waltermyer* in holding: "[s]ignificantly, however, [*Waltermyer*] indicated

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perfect attendance leave to the same extent as firefighters on vacation or voluntarily absent from work.

that a scheduled vacation, which also was exempted from the work requirement, was not comparable to military leave." *Rogers,* 392 F.3d at 767. Contrary to the court's interpretation, *Waltermyer* found it appropriate to consider the treatment of employees on voluntary vacation leave. In *dicta*, *Waltermyer* does note that vacation leave is different from the other types of leave which the employer singled out for favorable treatment, in that the "common thread" of the other types of absences is the "lack of choice." *Id.*, 804 F.2d at 825. "Vacation is earned time away from work, and this exception [in the collective bargaining agreement] merely recognizes that an employee should not be prejudiced, in the form of lost holiday pay, for taking an earned vacation." *Id.*, 804 F.2d at 825, n.3. However, this distinction did **not** prompt the court to discount the treatment of employees out on voluntary leave, as the Fifth Circuit did.[8] The Fifth Circuit's misconstruction of this single comment provides the sole foundation for the Fifth Circuit's wholesale exclusion of the entire category of voluntary leave benefits.

In *Allen v. United States Postal System,* 142 F.3d 1444 (Fed. Cir. 1998), the Federal Circuit also found it appropriate to compare the treatment of vacationing non-reservists with that of duty-serving reservists in analyzing whether the Postal System violated 38 U.S.C. § 4301(b)(3), the recodified version of VRRA § 2021(b)(3) (now, 38 U.S.C. § 4311(a)). *Allen* involved the question of whether the statute required an employer to notify reservists of job openings that might arise in their absence, a benefit which the Postal Service extended to employees out on "annual leave." *Id.*, 142 F.3d at 1445. The Federal Circuit found that the employer had placed reservists at a prohibited disadvantage by not providing such notices to them as well.

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[8] The dissent in *Waltermyer* also concluded that the majority's opinion included vacation leave in the ambit of comparison: "[a]s the majority points out, one class of employees who may be absent during the week in which a holiday occurs yet still receive holiday pay is the class of employees on vacation. Certainly, vacation leave is not involuntary." *Id.*, 804 F.2d at 827.

2. The Fifth Circuit's decision conflicts with the plain language and legislative history of § 4316(b).

The plain language of the USERRA § 4316(b) contains no qualifier based on the nature of the non-reservists' leave. Instead, to reach its result, the Fifth Circuit would alter the statute to provide that reservists are entitled to the benefits provided "to employees having similar seniority, status, and pay who are on **involuntary** furlough or leave of absence, under a contract . . . " The first and foremost analysis when interpreting a statute should be the "plain meaning" of the words that comprise the statute. *Kaiser Aluminum & Chemical Corp. v. Bonbon*, 494 U.S. 827, 835 (1990), citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "[I]f the intent of [a statute] is clear," then the plain meaning is conclusive and the analysis need proceed no further. *Norfolk & Western Ry. Co. v. American Train Dispatchers*, 499 U.S. 117, 128 (1991), quoting *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

This Court has rejected similar efforts to engraft requirements into the statutes designed to protect reservists. In *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991), the Court unanimously refused to limit the length of service after which a reservist retains the rights of reemployment under USERRA § 4316's statutory predecessor, VRRA's § 2024(d), to "reasonable" lengths of time. The principle reason for the Court's rejection of the employer's argument was the fact that the statute was "utterly silent about any durational limit on the protection it provides," which rendered it not "susceptible to interpretive choice." *Id.* at 573.

It is only when a statute is ambiguous that the courts review the legislative history of a statute to determine congressional intent. While we respectfully suggest that such an inquiry is not necessary here, an examination of legislative intent provides further support for the Court's rejection of the Fifth Circuit's holding. Congress clearly stated:

> The Committee intends to affirm the decision in *Waltermyer v. Aluminum Co. of America,* 804 F.2d 821 (3rd Cir. 1986) that, to the extent the employer policy or practice varies among various types of non-military leaves of absence, the most favorable treatment accorded **any particular leave** would also be accorded the military leave . . . Thus, for example, an employer cannot require servicemembers to reschedule their work week because of a conflict with reserve or National Guard duty, unless **all other employees** who miss work are required to reschedule their work.

H.R. REP. 103-65(I) (April 28, 1993), quoted in *Rogers,* 392 F.3d at 767 (emphasis added). The legislative history thus not only confirms that Congress intended the reach of the statute to be unqualified, but also that it interpreted *Waltermyer* in an unrestricted manner.

Finally, in its proposed regulations designed to implement USERRA, the Department of Labor also requires that a reservist's absences be treated on a par with absences for any other reason. *See* Proposed Regulations, Department of Labor, Veterans' Employment and Training Service, § 1002.150, 20 CFR 1002, Federal Register, Vol. 69, No. 181 p. 56294 (if non-seniority benefits vary according to the type of leave, reservist must be given "the most favorable treatment accorded to **any** comparable form of leave" . . .) (emphasis added).

3. The Fifth Circuit's decision conflicts with numerous rulings of this Court and the explicit mandate of Congress to construe legislation protecting reservists in a liberal fashion.

By denying reservists the benefits available to nonreservists absent on voluntary leave, the Fifth Circuit violated the mandate to construe USERRA in a liberal fashion for the benefit of reservists.

The United States has long extended special protections to individuals who are "called to the colors" and "[leave] private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-285 (1946). This Court has called such construction the "guiding principle" for the interpretation of statutes protecting reservists. *See Alabama Power Company v. Davis,* 431 U.S. 581, 584 (1977). Justice Souter, writing for a unanimous court[9] in *King v. St. Vincent's*, described such liberal construction as a "canon," and stated that even if the Court were to find the language of the statute more ambiguous on a "reasonableness" requirement for the length of protected leave, it would still reject such a requirement as a violation of the liberal construction principle. *Id.* at 574. *See also Coffey v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (predecessor to USERRA "is to be liberally construed for the benefit of the returning veteran"); *accord, Hill v. Michelin North America, Inc.*, 252 F.3d 307, 312-313 (4th Cir. 2001) (construing USERRA); *McGuire v. United Parcel Serv.*, 152 F.3d 673, 676 (7th Cir. 1998) (construing USERRA).

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[9] Justice Thomas did not participate in either the consideration or decision of the case.

In enacting USERRA, Congress expressly affirmed that the Act should be liberally construed:

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits, have been eminently successful for over fifty years. Therefore, the Committee wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act,[10] remains in

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[10] Congress rejected the Court's ruling in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981), that under the VRRA, a reservist would be required to prove that an employer's discriminatory actions against him were motivated solely by his reserve status, as being a misinterpretation of "the original legislative intent and history of 38 U.S.C. § 2021(b)(3)." H.R. REP. No. 103-65(I), at 24 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2457. Moreover, also in response to *Monroe,* Congress expanded the definition of "benefit" and "benefit of employment" to include an employee's right to select work hours, which the Court had determined not to be within the protective scope of § 2021(b)(3). "If Congress desires to amend § 2021(b)(3) to require special work-hour scheduling for military reservists where it is

(Continued on following page)

> full force and effect in interpreting these provisions. **This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed."**

H.R. REP. No. 103-65(I), at 18 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2451 (citations to *Fishgold* and *Alabama Power Co.* omitted).

Additionally, Congress took care to expressly state the purposes of the Act, which the legislative history describes as the "same purposes that were the basis of the enactment of the initial provisions in 1940 and have been the basis for all subsequent amendments and recodifications." H.R. REP. No. 103-65(I), at 20 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2453. Beginning with legislation passed during World War II, Congress has steadily expanded all aspects of legal protection, from the individuals protected, the employers covered, the circumstances included, to the benefits and entitlements conferred. Congressional efforts culminated in its passage of USERRA, in 1994, designed to "clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions." H.R. REP. No. 103-65(I), at 18 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2451.

The stated purpose of USERRA is to encourage "noncareer service in the uniformed services by **eliminating or minimizing the disadvantages to civilian careers** and employment which can result from such service," and the **prohibition of "discrimination**

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reasonably possible, it is free to do so." *Id.* at 565. This, of course, is just what Congress did. *See* 38 U.S.C. § 4303(2).

against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a)(1) and (3) (emphasis added). Congress intended that "this section be helpful to courts construing the statute." S. REP. No. 103-158, at 40 (1993). The exclusion of an entire category of benefits maximizes the disadvantages that reservists suffer when they have to be absent from work, not minimizes them.

4. In rejecting the applicability of § 4311(a), the anti-discrimination provision, the Fifth Circuit's decision conflicts with the plain language of USERRA, the intent of Congress, and the prior decisions of this Court and other circuits.

The Fifth Circuit rejected the applicability of § 4311(a), USERRA's broad anti-discrimination provision, and declared that in cases involving non-seniority rights and benefits, only § 4316(b) will apply.[11] The petitioners urge the Court to resolve whether, when it comes to non-seniority benefits, § 4311(a) ensures that the disadvantages reservists suffer from their inevitable absences will indeed be eliminated or at least minimized, or that only

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[11] Since it is not disputed that the City provides certain benefits to non-reservists out on vacation and other voluntary leaves, the petitioners' claims concerning the twenty-seven (27) hour cap on lost overtime, bonus days and perfect attendance leave do not turn on the applicability of § 4311(a); in other words, even if the Court determines that § 4316(b) provides the only means of redress, they would still prevail if the Court determines that the Fifth Circuit has improperly excluded voluntary leave from consideration. However, since the City does not allow **any** non-reservists out on leave to make up work hours in an overtime or higher classification capacity which they miss when they are absent, the petitioners' claims regarding these benefits depend on the applicability of § 4311(a).

§ 4316(b) is available to ensure that they receive the same benefits as other employees out on leave.

In rejecting the applicability of § 4311(a),[12] the core protection afforded reservists, the Court ignored the plain language of USERRA, the intent of Congress, and the prior decisions of this Court and other circuits. The language of § 4311(a) is broad in its scope and clear in its meaning, providing that anyone who performs military service "shall not be denied . . . **any benefit of employment** by an employer on the basis of that . . . performance of service, . . . or obligation." 38 U.S.C. § 4311(a) (emphasis added). There is nothing in this language which suggests an exclusion of non-seniority related benefits. Similarly, there is nothing in the express language of § 4316(b)(1) to indicate it is the sole source of protection.

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[12] The Court cited three rationales for rejecting the district court's application of § 4311(a). *Rogers,* 392 F.3d at 770-771. The first two, which are related, do not have to do so much with the **inapplicability** of § 4311(a) as they do with the **applicability** of § 4316(b). Assuming, *arguendo,* that § 4316(b)(1) applies, does not mean that § 4311(a) would not **also** apply to a reservist who is absent from work for inactive training. The third underpinning for the Court's rejection of § 4311(a), was that its predecessor, § 2021(b)(3), was enacted to address only a limited range of employment discrimination. Again, assuming, *arguendo,* that this is accurate, it begs the question of Congress' intent with respect to USERRA §4311, especially coupled with that Act's expansive definition of "benefit," which specifically addresses a reservist's right to select work hours, as the petitioners wish to do in working the extra hours they missed when they are back on duty. *See* 38 U.S.C. § 4303(2). "These rights are broadly defined to include **all** attributes of the employment relationship which are affected by the absence of a member of the uniformed services because of military service. The list of benefits is illustrative and not intended to be all inclusive." H.R. REP. No. 103-65(I), at 21 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2454 (emphasis added).

By reading § 4311(a) out of the picture, the Fifth Circuit's decision violates the "cardinal rule that a statute is to be read **as a whole**, since the meaning of statutory language, plain or not, depends on context." *King* at 221 (internal citation omitted) (emphasis added). *See also United States v. Hartwell,* 73 U.S. (6 Wall.) 385, 396 (1868) (in construing statute court should adopt that sense of words which best harmonizes with context and promotes policy and objectives of legislature), cited in *King* at 221. Since the stated purpose of USERRA is to "encourage non-career service . . . by eliminating or minimizing the disadvantages to civilian careers and employment" and to "prohibit discrimination against persons because of their service in the uniformed services," it flies in the face of the Act to remove non-seniority benefits from the anti-discrimination protection afforded by § 4311(a).

The Federal Circuit, in *Allen v. United States Postal Service*, determined that USERRA's § 4311(a) applied to the non-seniority rights in that case. Rather than holding that § 4311(a) did not apply at all, *Allen* harmonized § 4311(a) with § 4316(b). The application of both provisions is consistent with the principle of liberal construction articulated in *Fishgold* and followed ever since. The Federal Circuit rejected the Fifth Circuit's position that the employer's proof that other employees did not receive notices of job openings when they were away on the leave[13] settled the matter against the reservist. Referring to what is now § 4316, the court stated:

> Although the USPS established that employees on "leave of absence" status were not sent position notices, an employer can not treat employees on military duty like those on non-military leave of absence **when the effect is to deny the benefits that the statute requires for employees on military duty** . . . The statute requires that the position, or the opportunity to apply for the position, "not be denied" to [the employee] because of his absence for military service.

Id. at 1447 (emphasis added). *See also Hill v. Michelin* (First Circuit held that § 4311(a) protected the non-seniority benefit of a preferred work schedule); *Schmauch v. Honda of America Mnfg.*, 295 F.Supp.2d 823 (S.D.Ohio 2003) (district court found that § 4311(a) protected the non-seniority benefit of an absence improvement plan); *Fink v. City of New York*, 129 F.Supp.2d 511 (E.D.New York 2001) (district court found that under § 4311(a) protected the non-seniority benefit of a reservist's entitlement to take a promotional examination he missed while he was off on leave).

In cases decided prior to the enactment of USERRA, the Court in *Monroe v. Standard Oil* found the VRRA's anti-discrimination provision, § 2021(b)(3), to apply to the non-seniority benefits (ability to select work hours) at issue in that case. *Monroe* at 557-565.[14] *Waltermyer* also applied § 2021(b)(3). *See also Carney v. Cummins Engine Company, Inc.*, 602 F.2d 763, 766 (7th Cir. 1979) (Seventh Circuit found that under VRRA § 2021(b)(3), the reservist was entitled to make up overtime opportunities he missed; court rejected argument that claim governed by § 2024(d)).

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[13] As discussed *infra* at p. 11, the exception to this rule was employees away on vacation. *Allen* at 1445.

Moreover, the Fifth Circuit based its holding that USERRA § 4316(b) governs this case on an erroneous and strained reading of the legislative history of USERRA; namely, that " . . . USERRA § 4316(b)(1) had no true predecessor" and that "Congress decided to adopt new § 4316(b)(1) to provide more specifically and affirmatively for the accrual of non-seniority rights and benefits by employees while on military duty, rather than continue to rely on the general prohibition against service-related denials of benefits for that purpose." *Rogers,* 392 F.3d at 771, 769. The Fifth Circuit's conclusion, though, is directly contrary to the legislative history describing § 4316(b)(1) as "similar to" the then-existing 38 U.S.C. § 4301(b)(1), which provided that reservists away on training would be "considered as having been on furlough or leave of absence" and "entitled to participate in insurance and other benefits" offered by the employer . . . " S. REP. No. 103-158, at 58 (1993). Moreover, Congress' intent with § 4316(b) was to **"expand the current protection."** *Id.* (emphasis added).

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[14] *Monroe* did not analyze the question of the reservist's entitlement to the non-seniority benefits as a conflict between the requirements of VRRA §§ 2024(d) and 2021(b)(3); instead, the Court found that there was no question that the employer had complied with § 2024(d) and proceeded to address the § 2021(b)(3) violation.

Finally, the court's conclusion is also impossible to reconcile with the legislative history of USERRA § 4311, which reflects that it was specifically intended to strengthen the protections afforded reservists and contains no hint of creating an exception for non-seniority benefits. *See* 139 CONG. REC. S14865-03, at S14883 (1993) ("This provision would strengthen considerably the current proscription of discrimination against members of the Reserve and National Guard.").

◆

CONCLUSION

For the reasons set forth herein and for such other reasons as this Court deems just and appropriate, petitioners ask this Court to grant this petition for writ of certiorari and find that USERRA § 4316(b) ensures that absent reservists will receive the same benefits as other employees out on leave, both involuntary and voluntary, and that USERRA § 4311(a) ensures that they will be able to make up the opportunities to work overtime and higher classification hours which they missed while they were training, even if no other employees are allowed to do the same.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-50588

ANTHONY ROGERS; ET AL.,

Plaintiffs,

ANTHONY ROGERS; RICHARD MORALES;
VENTURA CALDERON, JR.; ANDREW L. ALMAZAN;
ROBERT J. DE LEON; ROLANDO CESAR GARZA;
ROBERT A. GEARHART; ISIDRO MEDINA, JR.;
TIMOTHY L. MENCHACA; EMILIO M. MONTES;
BRUCE R. MOORE; NATHANIEL OAKMAN;
ANTONIO RIVAS; JEFFERY J. ZAVALA;
AND GEORGE W. RANDALL,

Plaintiffs-Appellees,

versus

CITY OF SAN ANTONIO,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

Before JONES, DENNIS and PICKERING, Circuit Judges.

DENNIS, Circuit Judge:

Plaintiffs, fifteen employees of the San Antonio fire department, who are members of either the United States military reserves or the National Guard ("Uniformed

Services"), brought this civil action under the Uniform Services Employment and Reemployment Rights Act of 1994 ("USERRA")[1] against the City of San Antonio, Texas for declaratory, injunctive, and equitable relief; compensation for lost wages and benefits; and additional liquidated damages. The plaintiffs contend that the City violated USERRA by denying them employment benefits because of their absences from work while performing their military duties in the Uniformed Services. More specifically, the employees assert that the City's Collective Bargaining Agreement ("CBA") and policies regarding military leave of absence deprive them of straight and overtime pay, opportunities to earn extra vacation leave and vacation scheduling flexibility, and opportunities to secure unscheduled overtime work and job upgrades. Plaintiffs assert that under USERRA § 4311(a)[2] "the City, in implementing these employment practices, unlawfully discriminate against them by deeming them 'absent' from work whenever they are on leave fulfilling their military reserve duties, as opposed to viewing them as 'constructively present at work.'"[3] The City contends that, because

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[1] 38 U.S.C. § 4301 *et seq.*

[2] Section 4311(a) of USERRA provides that:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform services in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

[3] *Rogers v. City of San Antonio, Texas*, 211 F.Supp.2d 829, 831 (W.D.Texas 2002).

§ 4316(b)(1)[4] provides that persons absent from civilian employment by reason of military service are entitled only to such non-seniority rights and benefits as the employer provides to employees when they are on non-military leaves of absence, plaintiffs cannot recover since they were treated equally as to such rights with all employees absent on non-military leave.

Facts

Plaintiffs are employed by the City fire department in its Fire Suppression division and Emergency Medical Services division ("Firefighters"). The CBA between the City and the employees' Union governs the working conditions of all City firefighters. Plaintiffs, as members of the Uniformed Services ("reservists"), typically must take leave of absence for military training a minimum of one weekend per month and one annual two week session. Reservists may volunteer or be ordered to take military leave to perform extra duties. In order to be promoted, reservists must meet the same educational requirements as a full-time active member of the Uniformed Services, such as officer training courses.

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[4] Section 4316(b)(1) of USERRA provides that:

> [A] person who is absent from a position of employment by reason of service in the uniformed services shall be –
>
> (A) deemed to be on furlough or leave of absence while performing such service; and
>
> (B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.

The parties agreed to bifurcate the liability and damages issues and filed cross-motions for partial summary judgment on the question of whether the City violated USERRA and is therefore liable to the plaintiffs. They also filed cross-motions on whether the plaintiffs' claims were barred or curtailed by a statute of limitations, laches or estoppel. The record consists principally of a joint stipulation of facts, the CBA, and a number of depositions.

The district court granted the employees' motion as to liability on substantially all claims and denied the City's cross-motion. The district court then referred the cross-motions regarding the statute of limitations, laches and estoppel to a magistrate judge. The magistrate judge granted plaintiffs' motion on these issues, holding that the employees were entitled to recover retrospective damages for the four-year period preceding the filing of their complaint. The district court determined that the summary judgments on the issues of liability and limitations on retrospective recovery "involve a controlling question of law to which there is a substantial ground for difference of opinion," and certified the judgments for interlocutory appeal under 28 U.S.C. § 1292(b).[5] The City appealed.

Standards of Review

The threshold question of law is one of statutory construction, viz., namely which provision of USERRA,

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[5] *Rogers v. City of San Antonio, Texas*, 2003 WL 1571550 (W.D.Tex. March 24, 2003).

§ 4311(a) or § 4316(b)(1), governs the adjudication of the employees' claims. The employees contend that the district court correctly applied only § 4311(a), which prohibits private employers from denying employment benefits to employees on the basis or their membership, service or obligations related to the United States military forces. The City contends that the district court erred in basing its decision on § 4311(a) because this case is appropriately governed only by § 4316(b)(1), which regulates the civilian employment non-seniority rights of persons who are required to be absent from jobs for service in the military forces. We review the decision of the district court on this issue of law *de novo. See Casas v. American Airlines, Inc.*, 304 F.3d 517, 520 (5th Cir.2002).

Once we have interpreted the statute and decided upon its proper application, we address the parties' cross-motions *de novo*, applying the same standards prescribed for use by the district court. *See Walker v. Thompson*, 214 F.3d 615, 624 (5th Cir.2000).

Analysis

1.

In order to decide how USERRA should be interpreted and applied in this case we will set forth an overview of the statute to give perspective to our reading of its parts. Because the statute is subject to different interpretations we will examine its legislative history, predecessor statutes, pertinent court decisions, and post-enactment administrative interpretations.

A. USERRA Overview

The purposes of USERRA, enacted in 1994, are: (1) "to encourage noncareer service in the uniformed services[6] by eliminating or minimizing the disadvantages to civilian employment which can result from such service"; (2) to provide for "the prompt reemployment" of persons returning to civilian jobs from military service and to "minimize the disruption [of their] lives . . . as well as [to those of] their employers, fellow employees and communities"; and (3) "to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301.

USERRA is the most recent in a series of laws protecting veterans' employment and reemployment rights dating from the Selective Training and Service Act of 1940.[7] USERRA's immediate precursor, the Veterans' Reemployment Rights Act (VRRA), was enacted as § 404 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974.[8] "Congress emphasized [1] USERRA's continuity with the VRRA and its intention to clarify and strengthen that law. [2] Federal laws protecting veterans' employment and reemployment rights for the past fifty years had been successful." [3] "[T]he large body of case law that had developed under those statutes remained in full force and effect, to the extent it is consistent with USERRA."[9]

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[6] "The term 'uniformed services' means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency." 38 U.S.C. § 4303(16).

[7] *See* Proposed Regulation, Department of Labor, Veterans' Employment and Training Service, § 1002.2, 20 CFR Part 1002, Federal Register, Vol. 69, No. 181 p. 56286 (2004) ("Proposed Regulation"). USERRA authorizes the Secretary of Labor to issue regulations implementing the Act with respect to States, local governments, and private employers. *Id.* at § 1002.4(b) at 56286. We cite these nonbinding Proposed Regulations for their persuasive authority only.

[8] *Id.*

USERRA's anti-discrimination provision prohibits an employer from denying initial employment, reemployment, retention in employment, promotion, or any benefit of employment to a person on the basis of membership, application for membership, performance of service, application for service, or obligation of service. 38 U.S.C. § 4311(a). Also, an employer must not retaliate against a person by taking adverse employment action against that person because he or she has taken an action to enforce a protection afforded under USERRA. *Id.* at § 4311(b).

Any person whose absence from a position of employment is necessitated by reason of service in the uniformed services is entitled to the reemployment rights and benefits of USERRA. *Id.* at § 4312(a). The returning uniform services member ("reservist") seeking reemployment must make a timely return to or application for reinstatement in the reservist's employment position. *Id.* at § 4312(a)(3). The employee reporting back to the employer following a period of less than 31 days must report not later than the beginning of the first full shift on the first full day following the completion of service. *Id.* at § 4312(e)(1)(A)(i).[10] If the service period is between 31 and 180 days, the individual must report within 14 days of completion of service. *Id.* at § 4312(c). If the service was more than 180 days, the individual must request reemployment no more than 90 days after completion. *Id.* at § 4312(e)(1)(D).

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[9] *Id.*

[10] *See* Proposed Regulation, summary, 69 F.R. No. 181 at 56270.

An employer must promptly reemploy a person returning from a period of service if the person meets the Act's eligibility criteria. *Id.* at § 4312(f)(4). "Prompt employment" means as soon as practicable under the circumstances of the case. For example, prompt reinstatement after "weekend National Guard duty generally means the next regularly scheduled working day."[11] However, prompt reinstatement after "several years of active duty may require more time, because [the] employer may have to reassign or give notice to another employee who occupied [the] position."[12]

In construing a precursor to USERRA, the Supreme Court in *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946), invented the "escalator" principle in stating that a returning service member "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Id.* at 284-285, 66 S.Ct. 1105. Although *Fishgold* was mainly a seniority case, the escalator principle applies to the employment position, and rate of pay, as well as the seniority rights to which the returning service member is entitled.[13]

Thus, USERRA requires that the service member be reemployed in the escalator job position comparable to the position he would have held had he remained continuously in his civilian employment. 38 U.S.C. § 4313. After service of 90 days or less, the person is entitled to reinstatement in the position of employment in which she or he would have been but for the interruption of employment by uniformed service. *Id.* at § 4313(a)(1)(A).[14] If the service period was longer than 90 days, the service member is entitled to reemployment in the escalator position, but the employer may also reinstate the member in any position of like seniority status and pay for which he is qualified. 38 U.S.C. § 4313(a)(2)(A). If the service member is unable to qualify for either the escalator position or a comparable position, despite reasonable employer efforts, he is entitled to reemployment in a position that is the nearest approximation to the escalator position. *Id.* at § 4313(a)(2)(A), (B).[15]

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[11] Proposed Regulation § 1002.181.

[12] *Id.*

[13] Proposed Regulation, summary 69 F.R. No. 181 at 56274.

A person who is reemployed under USERRA is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the beginning of service plus the additional seniority and rights and benefits that he or she would have attained if the person had remained continuously employed.[16] *Id.* at

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[14] *Id.*

[15] *Id.*

[16] Section 4303(12) of USERRA defines "seniority" as: longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment. The summary for USERRA's Proposed Regulations explains that:

> This definition imposes two requirements: first, the benefit must be provided as a reward for length of service rather than a form of short-term compensation for services rendered; second, the service member's receipt of the benefit, but for his or her absence due to service, must have been reasonably certain. *See Coffy v. Republic Steel Corp.*, 447 U.S. 191, 100 S.Ct. 2100, 65 L.Ed.2d 53 (1980); *Alabama Power Co. v. Davis*, 431 U.S. 581, 97 S.Ct. 2002, 52 L.Ed.2d

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§ 4316(a). This section states the basic escalator principle as it applies to seniority and seniority-based rights and benefits.[17] An employer is not required to have a seniority system. USERRA requires only that employers who do have a seniority system restore the returning service member to the proper place on the seniority ladder.[18] An employee's rate of pay after an absence from work due to uniformed service is also determined by application of the escalator principle.[19]

USERRA does not grant escalator protection to service members' non-seniority rights and benefits but provides only that the employer treat employees absent because of military service equally with employees having similar seniority, status, and pay who are on comparable non-military leaves of absence under a contract, agreement, policy, practice, or plan in effect at anytime during that uniformed service.[20] § 4316(b)(1).

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595 (1977); *see also* S.Rep. No. 103-158, at 57 (1993), citing with approval *Goggin v. Lincoln, St. Louis*, 702 F.2d 698, 701 (8th Cir.1983) (summarizing Supreme Court formulation of two-part definition of "perquisites of seniority").

Proposed Regulation, summary 69 F.R. No. 181 at 56276.

[17] *Id.*

[18] *Id.*

[19] *Id.* At 56277.

[20] Proposed Regulation, summary 69 F.R. No. 181 at 56272 (interpreting § 4316(b)(1) to mean that "[i]f the employer has more than one kind of non-military leave and varies the level and type of benefits provided according to the type of leave used, the comparison should be made with the employer's most generous form of comparable leave," and citing *Waltermyer v. Aluminum Co. of Am.*, 804 F.2d 821 (3d Cir.1986); H.R.Rep. No. 103-65, Part I at 33-34 (1993); *Schmauch v. Honda of Am. Manufacturing, Inc.*, 295 F.Supp.2d 823 at 836-39 (S.D.Ohio 2003)).

B. Legislative History and Jurisprudence

The nation's first peacetime draft law, the Selective Training and Service Act of 1940 was designed to provide reemployment for veterans returning to civilian life in positions of "like seniority, status, and pay." Pub.L. No. 54-783, § 8, 54 Stat. 885, 890 (1940). In 1951, Congress extended reemployment rights to reservists who had been called up from civilian jobs for active or training duty. Pub.L. No. 51, Ch. 144, § 1(s), 1951, 65 Stat. 75, 86-87. The Armed Forces Reserve Act of 1952 extended reemployment rights to National Guardsmen. Pub.L. No. 476, 66 Stat. 481. The Reserve Forces Act of 1955, Pub.L. 305, Ch. 665, § 262(f), 69 Stat. 598, 602, "provided that employees returning from active duty for more than three months in the Ready Reserve were entitled to the same employment rights as inductees, with limited exceptions." *Monroe v. Standard Oil Co.*, 452 U.S. 549, 555, 101 S.Ct. 2510, 69 L.Ed.2d 226 (1981).

In 1960, these reemployment rights and benefits were extended to National Guardsmen. Pub.L. 86-632, 74 Stat. 467. *See* VRRA § 2024(c), *Monroe,* 452 U.S. at 549, 101 S.Ct. 2510. A new section, VRRA § 2024(d), was also enacted in 1960 to protect employees who had military training obligations lasting less than three months. "This section provide[d] that employees must be granted a leave of absence for training and, upon their return, be restored to their positions 'with such seniority, status, pay, and vacation' as they would have had if they had not been absent for training." *Monroe,* 452 U.S. 549, 101 S.Ct. 2510.

VRRA § 2024(d) did not, however, protect reservists from discrimination by their employers in the form of discharges, demotions, or other adverse conduct between leaves of absence for training. In the years following its enactment discriminatory employment practices intensified. Congress responded with legislation codified as VRRA § 2021(b)(3) which, in pertinent part, provided that "[a]ny person who [is employed by a private employer] shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces."

Senate Report No. 1477 explained the purpose of § 2021(b)(3) as follows:

> Employment practices that discriminate against employees with reserve obligations have become an increasing problem in recent years. Some of these employees have been denied promotions because they must attend weekly drills or summer training and others have been discharged because of these obligations ... The bill is intended to protect members of the Reserve components of the Armed Forces from such practices.... [Under it] reservists will be entitled to the same treatment afforded their coworkers not having such military obligations.... S.Rep. No. 1477, 90th Cong., 2d Sess., Reprinted in (1968) U.S.Code Cong. & Admin. News, pp. 3421, 3421.

The House Report similarly indicated that these were the purposes and effects of the legislation. H.R.Rep. No. 1303, 90th Cong.2d Sess., 3 (1968). *See Monroe,* 452 U.S. at 557, 101 S.Ct. 2510.

As the Sixth Circuit noticed in *Monroe v. Standard Oil Co.,* 613 F.2d 641, 646 (6th Cir.1980), however, VRRA § 2021(b)(3) was subject to two different interpretations:

> First, it can be read to mean that any time an employee's forced absence for reserve duty requires him to forgo a benefit that would have accrued to him only if he had been present for work, he has been "denied" an incident or advantage of employment "because of" his military obligation.

Or, it can be read to "merely require[] that reservists be treated equally or neutrally with their fellow employees without military obligations[,]" and "[t]o meet this requirement, collective bargaining agreements and employment rules must be facially neutral and must be applied uniformly and equally to all employees." *Id.*

The Fifth Circuit and other courts adopted the first interpretation of VRRA § 2021(b)(3) by holding that, if the right in question is granted to all employees but is denied to a reservist solely because of his absence to attend to military obligations, the reservist is denied an "incident or advantage of employment" because of an obligation as a member of a reserve component.[21]

In *West v. Safeway Stores, Inc.*, the Fifth Circuit construed § 2021(b)(3) "to require that employers, in applying collective bargaining agreements, treat reservists as if they were constructively present during their reserve duty in similar contexts." 609 F.2d at 150. The employee, a meat cutter, had contended that, since the collective bargaining agreement guaranteed a 40 hour work week and because the only reason that he was not receiving a 40 hour work week was due to his National Guard obligations, he was being denied an advantage of employment. The court agreed and held that the employer must provide him with his guaranteed 40 hour work week despite the fact that the collective bargaining agreement specifically provided that an employee's absence for weekend reserve or National Guard duty was excluded or negated from the guarantee.[22]

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[21] *See West v. Safeway Stores, Inc.*, 609 F.2d 147 (5th Cir.1980), *Kidder v. Eastern Air Lines, Inc.*, 469 F.Supp. 1060 (S.D.Fla.1978), *Carlson v. New Hampshire Dep't of Safety*, 609 F.2d 1024 (1st Cir.1979), *cert. denied*, 446 U.S. 913, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980), *Hawes v. General Motors Corp.*, 102 L.R.R.M. (BNA) 3041 (N.D.Ohio 1979), *Lott v. Goodyear Aerospace Corp.*, 395 F.Supp. 866 (N.D.Ohio 1975), *Carney v. Cummins Engine Co.*, 602 F.2d 763 (7th Cir.1979), *cert. denied*, 444 U.S. 1073, 100 S.Ct. 1018, 62 L.Ed.2d 754.

The Sixth Circuit in a virtually identical situation, involving a 40 hour work week guarantee, however, disagreed with *West*, holding that § 2021(b)(3) merely required that reservists be treated no differently than other employees who are absent for non-military reasons. *Monroe,* 613 F.2d 641. The employee's collective bargaining agreement right to work a 40 hour week, as in *West*, was contingent on the employee being present for work or arranging to switch shifts, as permitted by the agreement. Thus, the court held, because the employee was treated the same as his coworkers regarding absences and exchanging shifts, that right did not vest when the employee failed to do either, and the employer was required to do no more than grant him a leave of absence without pay to comply with his military reserve obligation. Further, the court found "nothing in the legislative history or the statute to support judicial invalidation of nondiscriminatory conditions precedent to employee benefits and adhere[d] to [its] belief that conditional benefits are protected by § 2021(b)(3) only to the extent that the conditions have been actually satisfied." *Id.* at 647.

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[22] The Court noted that "[i]f employers could by agreement with unions require that workers be present in order to receive certain benefits, then reservists could never secure the benefits or advantages of employment which the Act was designed to protect." *Id.* at 150. In closing, however, the Court acknowledged that because the employer had conceded that it could accommodate West's schedule, it did "not reach the issue of whether accommodation or the alternative of compensation is impossible or unduly burdensome." *Id.*

The Supreme Court granted certiorari in *Monroe,* affirmed the Sixth Circuit's decision, and substantially agreed with its reasoning. 452 U.S. 549, 101 S.Ct. 2510, 69 L.Ed.2d 226. The Supreme Court concluded that the "legislative history . . . indicates that § 2021(b)(3) was enacted for the significant but limited purpose of protecting the employee-reservist against discrimination like discharge and demotion," by reason of reserve status. *Id.* at 559, 101 S.Ct. 2510. Further, the Court found nothing in § 2021(b)(3) or its legislative history to indicate that Congress even considered imposing an obligation on employers to provide a special work-scheduling preference, but rather that the history suggests that Congress did not intend employers to provide special benefits to employee-reservists not generally made available to other employees. *Id. at* 561, 101 S.Ct. 2510. Because the Supreme Court's interpretation of § 2021(b)(3) is contrary to the Fifth Circuit's decision in *West,* and the high court noted the "apparent inter-circuit conflict on this issue" between *West* and the Sixth Circuit's decision,[23] we conclude that *West*'s "constructive presence" interpretation was disapproved by *Monroe.*

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[23] *Id.* at 551 n. 1, 101 S.Ct. 2510.

After the Supreme Court's decision in *Monroe,* the Third Circuit, in *Waltermyer v. Aluminum Co. of America,* 804 F.2d 821 (3d Cir.1986), addressed whether a National Guardsman was entitled to pay for a holiday that occurred during his leave of absence for a two-week military training period. "The collective bargaining agreement limited eligibility for holiday pay to individuals who worked during that week, but exempted from that requirement persons in a number of categories who were absent for reasons beyond their control." *Id.* at 821. The agreement provided that full-time employees would receive pay for designated holidays if, during the payroll week in which the holiday occurs, the employee is at work; on a scheduled vacation; on a layoff under specified conditions; performing jury service; a witness in a court of law; qualified for bereavement pay; or absent because of personal illness and certain sick leave conditions apply. *Id.* at 822. Reading VRRA § 2021(b)(3) in light of the Supreme Court's decision in *Monroe,* the Court of Appeals concluded that "[t]he thrust of [that provision], according to the [Supreme] Court, was to prevent discrimination against reservists but not to grant them preferential treatment." *Id.* at 823. The court noted the similarities between the characteristics of absence from work required by the military obligation at issue and the absences of the exempted categories, viz., the absences were not generally of extended duration; and they were for reasons beyond the control of the absent employee. *Id.* at 825. Therefore, the court concluded, "relieving [National Guard members] on military leave from the work requirement merely establishes equality for National Guardsmen and reservists, not preferential treatment." *Id.* at 825. Thus, the court concluded, the plaintiff Guardsman had established his right to holiday pay under § 2021(b)(3). Significantly, however, the court indicated that a scheduled vacation, which also was exempted from the work requirement, was not comparable to military leave. The court observed: "We realize a planned vacation is different from the other exceptions on the list. Vacation is earned time away from work, and this exception merely recognizes that an employee should not be prejudiced, in the form of lost holiday pay, for taking an earned vacation." *Id.* at 825 n. 3.

The Senate report on the bill that became § 4316(b)(1) stated that it "would codify court decisions that have interpreted current law as providing a statutorily-mandated leave of absence for military service that entitles service members to participate in benefits that are accorded other employees. *See Waltermyer,* 804 F.2d 821; *Winders v. People Express Airlines, Inc.,* 595 F.Supp. 1512, 1519 (D.N.J.1984), *affirmed,* 770 F.2d 1078 (3d Cir.1985)." S. Rep. 103-158 (October 18, 1993). The Report explained that:

> [A]n individual who serves in the uniformed services will be considered to be on furlough or leave of absence while in the service [and] will be entitled to the same rights and benefits not determined by seniority that are generally provided to the employer's other employees with similar seniority, status, and pay who are on furlough or leave of absence[,] under a practice, policy, agreement, or plan in force at the beginning of the period of uniformed service or which becomes effective during the period of service. *Id.*

The House Report declared that the bill had the same purpose and effect. The bill was described as providing for "[r]ights, benefits, and obligations of persons absent from employment for service in a uniformed service." H.R. Rep. 103-65(I) (April 28, 1993). The House Report elaborated:

> The Committee intends to affirm the decision in *Waltermyer v. Aluminum Co. of America*, 804 F.2d 821 (3d Cir.1986) that, to the extent the employer policy or practice varies among various types of non-military leaves of absence, the most favorable treatment accorded any particular leave would also be accorded the military leave, regardless of whether the non-military leave is paid or unpaid. Thus, for example, an employer cannot require service members to reschedule their work week because of a conflict with reserve or National Guard duty, unless all other employees who miss work are required to reschedule their work. *Cf. Rumsey v. New York State Dept. of Corr. Services*, 124 L.R.R.M. 2914, 1987 WL 11617 (N.D.N.Y.1987). However, servicemembers are not entitled to receive benefits beyond what they would have received had they remained continuously employed.

Id. See also 139 CONG. REC. S 14865-03m, 1993 WL 444411 (Nov. 2, 1993); A NON-TECHNICAL RESOURCE GUIDE TO THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA), U.S. DEPT. OF LABOR VETERANS EMPLOYMENT AND TRAINING SERVICE, 9 (March 2003).[24]

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[24] That guide provides, in pertinent part, as follows:

Rights not based on seniority Section 4316(b)[:] Departing service members must be treated as if they are on a leave of absence. Consequently, while they are away they must be entitled to participate in any rights and benefits not based on seniority that are available to employees on nonmilitary leaves of absence, whether paid or unpaid. If there is a

(Continued on following page)

Although the legislative history of the bill that became § 4316(b)(1) does not mention *Monroe,* Congress necessarily intended for that section to codify *Monroe*'s interpretation of § 2021(b)(3) with respect to the effects upon the non-seniority rights of uniformed service members by their absences from civilian employment by reason of their military obligations. The reports of both the Senate and the House expressed an intention to codify *Waltermyer* in this respect. *See* H.R. Rep. 103-65(I) (April 28, 1993), S. Rep. 103-158 (Oct. 18, 1993). Thus, they necessarily indicated an intent to codify *Monroe*'s "equal, but not preferential" interpretation of VRRA § 2021(b)(3) which was adopted and followed by *Waltermyer.* Although *Waltermyer* applied the *Monroe* interpretation to enforce the employee's right to equal treatment, rather than the employer's right not to grant preferential treatment, *Waltermyer* could not be codified without including the *Monroe* interpretation that it adopted.

Conversely, USERRA's legislative history does not indicate that Congress intended to rely on § 4311(a)'s general discrimination ban to assure that reservist-employees on military leave receive benefits equal to those that other employees receive while taking comparable non-military leave. While new § 4316(b)(1)'s legislative history clearly reflects the intent to specifically guarantee reservists equality of on-leave benefits, the history of § 4311(a)

> variation among different types of nonmilitary leaves of absence, the service member is entitled to the most favorable treatment so long as the nonmilitary leave is comparable. For example, a three-day bereavement leave is not comparable to a two-year period of active duty.

Id. Available at: http://www.dol.gov/vets/whatsnew/uguide.pdf.

shows an intent to continue and strengthen the antidiscrimination provision but not the specific goal of guaranteeing parity of benefits.

Further, the brief legislative history of the bill that became § 4311(a) reflects no intention to prohibit neutral labor contracts from treating employees on military leave equally with those on non-military leave with respect to the loss of benefits due to absence from work. The House report, in most relevant part, states that:

> Current law protects Reserve and National Guard personnel from termination from their civilian employment or other forms of discrimination based on their military obligations. Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment, (*see Beattie v. The Trump Shuttle, Inc.*, 758 F.Supp. 30 (D.D.C.1991)), current employees who are active or inactive members of Reserve or National Guard units, current employees who seek to join Reserve or National Guard units (*see Boyle v. Burke,* 925 F.2d 497 (1st Cir.1991)), or employees who have a military obligation in the future such as a person who enlists in the Delayed Entry Program which does not require leaving the job for several months. *See Trulson v. Trane Co.,* 738 F.2d 770, 775 (7th Cir.1984).

H.R. Rep. 103-65(I) (April 28, 1993). The Senate report likewise does not indicate that Congress intended to prohibit such neutral labor contract provisions. The report, in most pertinent part, provides:

> New section 4311(a) would specify the relationship to service that would bring individuals within the VRR law and also specifies the actions

> of employers that would constitute violations of that law. Specifically, as to individuals, the section would provide that individuals who are members of, perform, have performed, apply to perform, or have an obligation to perform service in the uniformed services would be covered by the law. The section would provide that such individuals may not be denied initial employment, reemployment, retention, promotion, or any benefit of employment by an employer on the basis of the relationship to service.

S. Rep. 103-158 (October 18, 1993).

The legislative history of §§ 4311(a) and 4316(b)(1) does not mention *West*, 609 F.2d 147. On the other hand, that legislative history expresses an intent to codify in § 4316(b)(1) the *Monroe-Waltermyer* line of cases with respect to non-seniority rights and benefits to which persons absent from civilian employment by reason of service in the uniformed services are entitled. *West* is inconsistent with and was expressly disapproved by *Monroe* and *Waltermyer*.[25] Therefore, we must conclude that USERRA's codification of *Monroe* and *Waltermyer* legislatively overruled *West*.

C. Section 4316(b)(1) Governs This Case

Section 4316(b)(1) of USERRA provides that an employee who is absent from employment for military service is deemed to be on leave of absence and "entitled to such rights and benefits not determined by seniority . . . generally provided by the employer to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice or plan. . . . " Reading § 4316(b)(1) together with § 4311(a) and other USSERA provisions, the legislative history, preceding statutes, and pertinent jurisprudence, we conclude that Congress intended by § 4316(b)(1) to clarify and codify the interpretation of VRRA § 2021(b)(3) by the Supreme Court in *Monroe* and the Third Circuit in *Waltermyer*, requiring employers, with respect to rights and benefits not determined by seniority, to treat employees taking military leave, equally, but not preferentially, in relation to peer employees taking comparable non-military leaves generally provided under the employer's contract, policy, practice or plan. Although, the "equal, but not preferential" requirement arose out of the Courts' interpretation of VRRA § 2021(b)(3)'s prohibition against denial of employment rights because of military obligations, which has been enhanced and continued by USERRA § 4311(a), Congress decided to adopt new § 4316(b)(1) to provide more specifically and affirmatively for the accrual of non-seniority rights and benefits by employees while on military duty, rather than continue to rely on the general prohibition against service-related denials of benefits for that purpose. Congress sought by § 4316(b)(1) to guarantee a measure of equality of treatment with respect to military and non-military leaves and to strike an appropriate balance between benefits to employee-service persons and costs to employers. USERRA does not authorize the courts to add to or detract from that guarantee or to restrike that balance.

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[25] *Monroe*, 452 U.S. at 551 n. 1, 101 S.Ct. 2510 (recognizing that the Sixth Circuit's opinion in *Monroe* conflicted with *West* and affirming the Sixth Circuit), *Waltermyer*, 804 F.2d at 821 (noting that *West* was "substantially weakened" by *Monroe*).

For these reasons, we conclude that the district court erred in deciding that § 4311(a), rather than § 4316(b)(1), must be applied in this case. Because the district court gave several reasons for its interpretation, we will set them forth before commenting on each.

The district court decided that "[s]ection 4316 is inapplicable to this case [, because] it only applies to a person who is reemployed under this chapter or who is absent on furlough or leave of absence."[26] The district court stated that § 4316 "is specifically tailored to apply to a reservist or veteran returning to employment from active duty rather than reservists . . . who have been away for relatively short periods [for] drilling and training [.]"[27] Furthermore, the court stated, "the anti-discrimination provisions (now § 4311(a-c), formerly, § 2021(b)(3)) were specifically added 'to protect the rights of reservists which had been found to be inadequately protected' under the provision cited by the City (§ 4316, formerly VRRA § 2024(d))."[28] Concluding that this case should be analyzed and decided under USERRA's § 4311(a) anti-discrimination provision, the district court identified *West*, 609 F.2d 147, decided under VRRA § 2021(b)(3), as our Circuit precedent that must be applied in deciding claims under the USERRA for non-seniority benefits by employees returning from service in the uniformed services.[29] The district court read *West* to hold that VRRA § 2021(b)(3) "requires that employers, in applying collective bargaining agreements which grant a benefit of employment based on 'presence' rather than on 'hours actually worked,' should treat reservists as if they were 'constructively present' during their reserve duty."[30]

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[26] 211 F.Supp.2d. at 838 (footnotes and internal quotations omitted).

[27] *Id.*

[28] *Id.* (quoting *Carney*, 602 F.2d 763).

[29] *Id.* at 839 n. 63, 841 n. 82, 842, 844 n. 106.

We believe that the district court was mistaken in each of its reasons for deciding that § 4311(a) must be applied in this case and, consequently, also mistaken in using the *West* "constructive presence" theory to decide the firefighters' claims. We will discus the erroneous points of the district court's decision in the order set forth in its opinion.

First, § 4316(b)(1) is fully applicable to reservists' short absences from civilian employment for weekend drills or two-week annual training. In USERRA, the term "service in the uniformed services" means "the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority." 38 U.S.C. § 4303(13). It includes "active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty," medical examinations to determine fitness for duty, and performance of funeral honors duty. *Id.* The term "uniformed services" means "the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty[.]" 38 U.S.C. § 4303(16). Thus, both of these terms apply to members of the uniformed services who participate in inactive duty training for weekend drills and two-week annual training. Consequently, § 4316(b)(1), which applies to "a person who is absent from a position of employment by reason of service in the uniformed services" is fully applicable to reservists during their weekend and two-week military duty sessions.[31]

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[30] *Id.* at 842.

Second, "reemployment" is not formally defined in § 4303, but §§ 4312-4313, providing for USERRA reemployment rights and positions, plainly apply to "any person whose absence from a position of employment is necessitated by reason of service in the uniformed services." 38 U.S.C. § 4312. As noted in the previous paragraph, the terms "service in the uniformed services" and "uniformed services" apply to "inactive duty training," which refers to reservists and their two week and weekend training periods. Further, USERRA makes specific provisions for the reemployment of a person whose period of service in the uniformed services was less than 31 days. 38 U.S.C. § 4312(e)(1)(A); 4313(a)(1). Thus, a reservist who returns to his or her job after weekend drill is "reemployed" just as much as one who is reinstated after a period of service of two years.[32]

Third, the district court mistakenly thought that VRRA § 2024(d) was the precursor of USERRA § 4316(b)(1). However, USERRA § 4316(b)(1) had no true predecessor and deals with a different subject (non-seniority rights of persons absent for military service) from VRRA § 2024(d) (reemployment rights). VRAA § 4301(b)(1) was somewhat similar to USERRA § 4316(b)(1) but not a true precursor. *See* S. Rep. 103-158 (1993). VRAA § 2021(b)(3) was added to protect against discrimination (such as punitive discharges, demotions, et al.) not protected against by VRAA § 2024(d). *See* legislative history of USERRA, *supra*. Thus, VRRA § 2021(b)(3) was not added to cure a deficiency in a prior provision similar to USERRA § 4316(b)(1).

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[31] *See Gordon v. Wawa Inc.*, 388 F.3d 78, 81 (3d Cir.2004) (construing "service in the uniformed services" as applicable to a reservist's "weekend Reserve duties" with respect to his duty under USERRA § 4312(e) to report to his employer upon completion of his period of service).

[32] *See* Proposed Regulation, summary, 69 F.R. No. 181 at 56270 (explaining that employees are "reemployed" when they return to work after a weekend or two years) and 56274 (explaining that USERRA considers employees to be "reemployed" whether they are gone for more or less than 31 days).

Finally, as we have noted, *West* and its "constructively present" theory of interpretation was disapproved by the Supreme Court in *Monroe* and legislatively overruled in the codification of *Monroe* and *Waltermyer* by USERRA § 4316(b)(1).

2.

Applying § 4316(b)(1) to the summary judgment record in this case, we conclude that the district court's judgment must be reversed and summary judgment granted for the City on the following claims: (1) lost straight-time pay; (2) lost overtime opportunities; and (3) missed upgrading opportunities. From our review of the record we have determined that there is no type of non-military leave available to any employee under which an employee can accrue or receive the foregoing kinds of benefits. Hence, insofar as the record shows, there is no type of leave under which these benefits may accrue that is comparable to any military leave.

We further conclude that the district court's summary judgment with respect to: (1) bonus day leave; (2) perfect attendance leave; and (3) the twenty-seven hour cap on lost overtime must be reversed and the case remanded for further proceedings on these claims. There are genuinely disputable issues as to the material facts of whether involuntary non-military leaves, not generally for extended durations, for jury duty, bereavement, and line of duty injury leave (provided that the employee returns to work in the following shift), under which employees may accrue or receive bonus day leave and perfect attendance leave benefits, are comparable to each plaintiff's military leaves taken for service in the uniformed services. For the same reason, there is a disputable issue as to whether sick leave, under which employees receive the benefit of the twenty-seven hour cap for the first shift of sick leave they use, is comparable to military leave. Thus, we reverse and remand on this claim also.

We also conclude that the summary judgment in favor of Anthony Rogers must be reversed because the record does not contain adequate evidence to support the judgment. The City must be granted summary judgment on this claim.

3.

We must determine the period of time, pre-filing, during which damages accrued so as to be recoverable under USERRA. The district court referred the issues regarding the statute of limitations, laches, and equitable estoppel to a magistrate judge and the parties consented to the magistrate judge's jurisdiction pursuant to 28 U.S.C. § 636(c) for that purpose. The parties filed cross-motions for partial summary judgment. The magistrate judge held that the four-year statute of limitations in 28 U.S.C. § 1658 applies to plaintiffs' causes of action and that plaintiffs' claims are not barred by the equitable defenses of laches or estoppel.[33] The district court certified this issue for appeal under 28 U.S.C. § 1292(b), and the City appeals the district court's holding.

Section 4323 of USERRA does not provide a time limit for bringing a claim for relief, stating only that "[n]o State statute of limitations shall apply to any proceeding under this chapter." 38 U.S.C. § 4323(I). The City argues that this court should borrow the two-year statute of limitations contained in the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 255(a). However, the City's argument that plaintiffs' claims are "strongly analogous" to FLSA claims is without merit. The City cites no case authority under USERRA or any previous statute governing veterans' employment and reemployment rights in which a court borrowed the FLSA statute of limitations. Furthermore, the purposes of the two acts are not similar. Congress passed the FLSA, pertaining to minimum wages and working conditions, for the purpose of improving nationwide labor conditions,[34] and USERRA for the purpose of encouraging military service by protecting uniformed service members' rights and benefits.[35] Plaintiffs' claims involve neither the violation of FLSA standards nor any similar standard. For these reasons, we reject the City's argument that we should borrow the two-year federal statute of limitations from the FLSA.

Plaintiffs presented arguments in both this court and the district court that 28 U.S.C. § 1658, the four-year uniform and general statute of limitations for federal causes of action not governed by an explicit statute of limitations, should apply. Alternatively, they now argue for the first time on appeal that no statute of limitations applies to USERRA claims and that their claims are not barred by either laches or estoppel.[36]

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[33] 172 L.R.R.M. (BNA) 2240, 2003 WL 1566502 (W.D.Tex. March 4, 2003).

[34] 29 U.S.C. § 202.

[35] 38 U.S.C. § 4301.

Because plaintiffs took the position before the magistrate judge that the four-year residual statute of limitations of § 1658 applied to their claims, and the court rendered judgment to that effect, plaintiffs have waived any claim to relief beyond four years prior to the date on which their complaint was filed.[37] Plaintiffs have thus limited their claim to relief and this court will not consider their argument that no statute of limitations applies.

The City also argues that regardless of the applicable limitations period for plaintiffs' claims, those claims are barred by the equitable doctrines of laches and estoppel. The district court determined that the plaintiffs' damages claims are not affected by those equitable affirmative defenses.

In order to invoke the doctrine of laches, the City must show an inexcusable delay in asserting a right and undue prejudice to the City as a result of that delay.[38] To invoke the doctrine of equitable estoppel, the City must show that it relied on a representation by plaintiffs, changed its position based on that reliance, and that it was prejudiced because of that change in position.[39] Essential to both of those claims is a showing by the City that it was prejudiced by plaintiffs' failure to bring their claims earlier. Because the district court properly found that the City did not introduce any summary judgment evidence either that any "delay" in plaintiffs asserting their claims was inexcusable or that the City was prejudiced by such delay, plaintiffs' claims are not barred by the equitable doctrines of laches or estoppel.

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[36] See, however, Proposed Regulations, summary, 69 F.R. No. 181 at 56281 ("The Department [of Labor] has long taken the position that no Federal statute of limitations applied to actions under USERRA.").

[37] *Vela v. City of Houston*, 276 F.3d 659, 678 (5th Cir.2001).

[38] *Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658, 668 (5th Cir.2000); *Miller v. City of Indianapolis*, 281 F.3d 648, 654 (7th Cir.2002) (applying laches to USERRA claims); *Wallace v. Hardee's of Oxford, Inc.*, 874 F.Supp. 374, 377 (M.D.Ala.1995) (invoking that same standard in the context of a USERRA claims).

The City's only allegations of prejudice are that at least one of the named plaintiffs no longer works for the City, that potential witnesses may be retired or unavailable, and that the City had already fulfilled its monetary liability to Plaintiffs by paying them under the CBA. Not only has the City presented no summary judgment evidence of such prejudice, but similar allegations of prejudice have been held to be insufficient in the USERRA framework.[40]

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[39] *Lauderdale County Sch. Dist., Knight, v. Enterprise Consol. School Dist.,* 24 F.3d 671, 691 (5th Cir.1994).

[40] *See Wallace,* 874 F.Supp. at 377 (employer not unduly prejudiced by the cost of defending VRRA suit now instead of earlier and by continuing to conduct its normal business operation); *Novak v. Mackintosh,* 937 F.Supp. 873, 880 (D.S.D.1996) (no prejudice in VRRA claim when there was no evidence that the employer changed its position in any way that would have occurred if there had not been delay). The City's allegation that it will be prejudiced by having to pay additional compensation to Plaintiffs above the amount bargained for in the CBA between the parties is similarly not a sufficient allegation of prejudice, as Plaintiffs' right to recover in this case is governed by statute rather than the CBA. *Carney,* 602 F.2d at 763.

Considering that the plaintiffs limited their claims for damages to the four-year period before the filing of their suits in the district court and that the City has not shown that it was prejudiced because of an inexcusable delay on plaintiffs' part, we affirm the district court's ruling that plaintiffs' claims for damages, if any, were not barred but are limited to recovery of damages commencing on October 4, 1995, four years preceding the filing of their claim.

Conclusion

The district court's judgment on the statute of limitations, laches, and equitable estoppel claims is AFFIRMED. Otherwise, the district court's judgment is REVERSED. Judgment is rendered for the City dismissing plaintiffs' claims for (1) lost straight-time pay; (2) lost overtime opportunities; and (3) missed upgrading opportunities. Judgment is also rendered for the City dismissing Anthony Rogers' individual claim. The case is REMANDED for further proceedings on the plaintiffs' claims for (1) bonus day leave; (2) perfect attendance leave; and (3) the twenty-seven hour cap on lost overtime.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ANTHONY ROGERS,	§	
RICHARD MORALES,	§	**CIVIL ACTION NO.**
VENTURA CALDERON, JR.,	§	**SA-99-CA-1110 OG**
ROBERT J. DELEON,	§	
ROLANDO CESAR GARZA,	§	
ROBERT A. GEARHART,	§	
ISIDRO MEDINA, JR.,	§	
TIMOTHY L. MENCHACA,	§	
EMILIO M. MONTES,	§	
BRUCE R. MOORE,	§	
NATHANIEL OAKMAN,	§	
MARK JAMES OLSON,	§	
ANTONIO RIVAS,	§	
JEFFREY J. ZAVALA, and	§	
GEORGE W. RANDALL,	§	
	§	
Plaintiffs,	§	
v.	§	
CITY OF SAN ANTONIO,	§	
TEXAS,	§	
	§	
Defendant.	§	

MEMORANDUM OF DECISION AND ORDER

A. *Introduction*

This is an action for declaratory, equitable, and injunctive relief brought by fifteen military reservists who are currently (or retired from)[1] working for the City of San

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[1] There is only one plaintiff, George W. Randall, who retired from the Fire Department on November 30, 2000. He was first employed by

(Continued on following page)

Antonio Fire Department.[2] They are assigned either to the Department's Firefighting division or to the Department's Emergency Medical Services (EMS) division.[3] They serve the country in a variety of branches of the United States military reserves and National Guard.[4] Through the filing of this lawsuit, plaintiffs challenge a number of the policies and practices of the City's Fire Department as being discriminatory under the provisions of the Uniform Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. § 4301 *et seq.* (2000). The challenged employment practices at issue concern, for instance, how military leave is excluded from the "twenty-seven" hour cap imposed on lost overtime, "bonus day" leave, "perfect attendance" leave, unscheduled overtime compensation and upgrading opportunities. In sum, plaintiffs argue the City, in implementing these employment practices, unlawfully discriminate against them by deeming them "absent" from work whenever they are on leave fulfilling their military reserve duties, as opposed to viewing them as "constructively present at work." Plaintiffs contend that the City's practices have resulted in disparate treatment discrimination on the basis of their military reserve status. Plaintiffs maintain they are not seeking preferential treatment, but rather, equal treatment with respect to the same employment benefits available to non-reservist employees.

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the Department on February 16, 1967 and continued his employment with the Department until his retirement. Plaintiffs' "Statement of Undisputed Facts," ¶ 13, attached as an Appendix to Plaintiffs' cross motion for partial summary judgment, Docket Entry 56.

[2] Docket Entry 49.

[3] Docket Entry 56, at 2.

[4] *Id.*

This Order addresses the cross-motions for partial summary judgment on the question of liability under USERRA.[5] Earlier in the case, the parties agreed to bifurcate this legal issue from the damages question. According to the parties' amended joint-stipulated facts,[6] the material factual record of this case is largely undisputed.[7]

Having considered the legal arguments presented by both parties, the summary judgment record and the applicable law, the court finds that plaintiffs' motion for partial summary judgment (Docket Entry 56) is well-taken and should be ***GRANTED,*** with the exception of plaintiffs' claim for "loss of straight-time for hours worked," which would be dealt with during the damages phase of the case. Plaintiffs have met their burden of establishing that their military service was "a motivating factor" in the application of the City's practices and policies concerning overtime compensation and upgrading procedures, among others. In other words, the City's policies and procedures would not have disparately impacted the plaintiffs but for their military reserve status. While the City has argued that it has not intentionally or purposefully singled out those employees who have military reserve duty such as the plaintiffs, the enactment and application of its policies and procedures concerning the employment benefits at issue in this case, does violate the rights afforded to these individuals under USERRA. Further, the City has failed to meet its burden to show that it would have taken the same actions, irrespective of the plaintiffs' military obligations. Consequently, and as set forth more fully below, the City's cross-motion for partial summary judgment (Docket Entry 60) will be ***DENIED.***

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[5] Docket Entries 56 & 60.

[6] Docket Entry 61.

[7] In saying this, however, the court acknowledges the City's objections to the plaintiffs' "Statement of Undisputed Facts," provided as an Appendix to plaintiffs' cross-motion for summary judgment. Docket Entry 62, at 1-3. The City has also objected to some of plaintiffs' summary judgment exhibits. *Id.* at 3-6. These objections will be addressed later in this Order.

B. Jurisdiction

This court has jurisdiction over this action pursuant to 38 U.S.C. § 4323 and 28 U.S.C. § 1331.

C. Issues Presented

1. Whether plaintiffs have established the City's actions are motivated by the plaintiffs' "membership" or obligation for service in the uniformed services?
2. Whether the City has affirmatively established that its actions "would have been taken" in the absence of such "membership" or obligation for service?

D. Summary Judgment Standard

The issue of liability under USERRA has been presented to the court through cross-motions for partial summary judgment.[8] A party is entitled to summary judgment upon motion if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[9] Mere allegations of a factual dispute between the parties will not defeat an otherwise proper motion for summary judgment; the requirement is that there be no genuine issue of material fact.[10] A fact is material if it might affect the outcome of the lawsuit under the governing law.[11] A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.[12] Therefore, summary judgment is proper if, under governing laws, there is only one reasonable conclusion as to the verdict; if reasonable finders of fact could resolve a factual issue in favor of either party, summary judgment should not be granted.[13]

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[8] Docket Entries 56 & 60.

A party seeking summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact.[14] To satisfy this burden, the movant must either submit evidentiary documents that negate the existence of some material element of the nonmoving party's claim or defense, or if the crucial issue is one for which the nonmoving party will bear the burden of proof at trial, merely point out that the evidentiary documents in the record contain insufficient proof concerning an essential element of the nonmoving party's claim or defense.[15] Regardless of whether the moving party accompanies its summary judgment motion with affidavits or other evidentiary materials, the motion must be granted if the evidence before the court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied.[16]

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[9] Fed.R.Civ.P. 56(c); ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); ***Banc One Capital Partners Corp. v. Kneipper***, 67 F.3d 1187, 1198 (5th Cir.1995); ***Neff v. American Dairy Queen Corp.***, 58 F.3d 1063, 1065 (5th Cir.1995), ***cert. denied***, 516 U.S. 1045, 116 S.Ct. 704, 133 L.Ed.2d 660 (1996).

[10] ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

[11] ***Id.*** at 248, 106 S.Ct. 2505. ***See also Thomas v. LTV Corp.***, 39 F.3d 611, 616 (5th Cir.1994).

[12] ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. at 248, 106 S.Ct. 2505; ***Wise v. E.I. DuPont De Nemours & Co.***, 58 F.3d 193, 195 (5th Cir.1995); ***MacMillan v. United States***, 46 F.3d 377, 380-81 (5th Cir.1995).

[13] ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. at 249, 106 S.Ct. 2505; ***Kunin v. Feofanov***, 69 F.3d 59, 61 (5th Cir.1995); and ***Banc One Capital Partners Corp.***, 67 F.3d at 1198.

Once the moving party has carried that burden, the burden shifts to the nonmoving party to show that summary judgment is not appropriate.[17] The nonmoving party cannot discharge this burden by referring to the mere allegations or denials of the nonmoving party's pleadings.[18] Rather, the nonmoving party's response must, either by submitting opposing evidentiary documents or by referring to evidentiary documents already in the record, set out specific facts showing the existence of a genuine issue for trial.[19] When both parties move for summary judgment, as in this case, each party must carry its own burden as the movant for its motion and as the non-movant in response to the other party's motion.[20] All justifiable inferences must still be drawn in favor of the losing party.[21]

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[14] ***Celotex Corp. v. Catrett,*** 477 U.S. at 323, 106 S.Ct. 2548; ***Wise,*** 58 F.3d at 195; ***Burfield v. Brown, Moore, & Flint, Inc.,*** 51 F.3d 583, 588 (5th Cir.1995).

[15] ***Edwards v. Aguillard,*** 482 U.S. 578, 595 n. 16, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987); and ***Celotex Corp. v. Catrett,*** 477 U.S. at 325, 106 S.Ct. 2548.

[16] ***Id.***

[17] ***Fields v. City of South Houston,*** 922 F.2d 1183, 1187 (5th Cir.1991).

[18] Fed.R.Civ.P. 56(e); ***Anderson v. Liberty Lobby, Inc.,*** 477 U.S. at 250, 106 S.Ct. 2505; ***State of Texas v. Thompson,*** 70 F.3d 390, 393 (5th Cir.1995).

1. The City's Objections to Plaintiffs' Summary Judgment Evidence

The City has filed objections to certain exhibits attached to plaintiffs' cross-motion for summary judgment.[22] Specifically, the City objects to portions of paragraphs 55 and 62, and to the entirety of paragraphs 82-90 of plaintiffs' "Statement of Undisputed Facts," as being contradictory to the Joint Stipulated Facts and/or based on subjective beliefs rather than the objective summary judgment record. The City also raises objections to the affidavits of plaintiff Anthony Rogers and Richard Ozuna and to the "wholesale inclusion" of various depositions. Plaintiffs have filed a response to each one of the City's objections.[23]

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[19] ***Celotex Corp. v. Catrett***, 477 U.S. at 324, 106 S.Ct. 2548; ***Fields***, 922 F.2d at 1187; ***Neff v. American Dairy Queen Corp.***, 58 F.3d at 1065; ***Engstrom v. First Nat'l Bank***, 47 F.3d 1459, 1462 (5th Cir.1995), ***cert. denied***, 516 U.S. 818, 116 S.Ct. 75, 133 L.Ed.2d 35 (1995).

[20] ***See Blackie v. Maine***, 75 F.3d 716, 721 (1st Cir.1996).

[21] ***See Murphy Expl. & Prod. Co. v. Oryx Energy Co.***, 101 F.3d 670, 673 (Fed.Cir.1996).

[22] Docket Entry 62.

[23] Docket Entry 65.

As a preliminary matter, the court notes it has not relied on any of the objected evidence in entering this Order. The court has only relied on the factual record undisputed by the parties.[24] The court, nevertheless, denies the City's objections in their entirety because they are based on the weight of the evidence and not on its admissibility.[25] Particularly, the court did not find it necessary to evaluate the individual merits of plaintiff Rogers' claim that he was purportedly denied upgrading and/or training opportunities because of his military reserve duties. That evidence is relevant to the damages question, but not to the legal issue of liability under USERRA.[26] Regarding the "wholesale" inclusion of various depositions, that objection is denied as plaintiffs have specifically identified the portions of the deposition testimony they rely on in support of their cross-motion for summary judgment.[27] For these reasons, and based on the arguments articulated by plaintiffs as to each of the objections raised by the City, the City's objections to certain exhibits attached to plaintiffs' summary judgment motion are ***DENIED.***

E. Analysis

From the outset, it should be noted that the parties fundamentally disagree with respect to the proper burden of proof applicable to discrimination cases under USERRA. Plaintiffs advocate that the proper burden of proof is the

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[24] Docket Entry 56, Plaintiffs' Appendix and docket entry 61.

[25] Docket Entry 62, at Section A, ¶¶ 4-5 and Section B, ¶ 1.

[26] ***See*** discussion, at 845-46, ***infra***.

[27] Docket Entry 65, at ¶ D.

"but for" test as opposed to the burden-shifting analysis used in traditional Title VII cases, and the one relied upon by the City.[28] The parties also disagree with respect to which USERRA provision governs the challenged employment practices at issue in this case. While plaintiffs rely on the broad provision of the statute prohibiting discrimination in employment rights, pay and benefits, 38 U.S.C. § 4311(a-c), the City maintains the controlling provision is § 4316 because the benefits at issue are seniority-based.[29] The correct position on these critical issues sets the stage for who will prevail in this case. The court finds that plaintiffs' position on both issues is correct.

1. Claims under USERRA

In 1994, Congress enacted USERRA which prohibits employment discrimination on the basis of military service and provides a private right of action for enforcement of rights under the Act.[30] Section 4301 describes the goals of USERRA as follows:

> (1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;
>
> (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and

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[28] Docket Entry 56, at 5-6, Docket Entry 60, at 2, and Docket Entry 64, at 2-5.

[29] Docket Entry 56, at 8-9, Docket Entry 60, at 6-7 and Docket Entry 64, at 5-6.

[30] 38 U.S.C. § 4323. USERRA replaced the Veterans' Reemployment Rights Act ("VRRA") on October 13, 1994.

their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and

(3) to prohibit discrimination against persons because of their service in the uniformed services.[31]

As reflected in § 4301, USERRA prohibits discrimination against military personnel on the basis of their military service and attempts to minimize the disadvantages to their civilian careers as a result of such service.[32]

According to Section 4311(b) of the Act "[a]n employer may not discriminate in employment against or take any adverse employment action against any person because such person . . . has exercised a right provided for in this chapter."[33] In that regard, section 4311(a) provides that: "[a] person who is a member of [. . .] a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or *any benefit of employment* by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."[34] The term "benefit of employment" is broadly defined.[35] It includes "any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement, or an employer policy, plan, or practice and includes [. . .] bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment."[36]

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[31] 38 U.S.C. § 4301.

[32] ***See Curby v. Archon,*** 216 F.3d 549, 556 (6th Cir.2000).

[33] 38 U.S.C. § 4311(b).

[34] § 431(a) (Emphasis added).

[35] ***See Yates v. Merit Systems Protection Board,*** 145 F.3d 1480, 1483 (Fed.Cir.1998).

Significantly, Section 4311(c)(1) of the Act sets forth the parties' respective burdens of proof:

> An employer shall be considered to have engaged in actions prohibited under subsection (a) [of USERRA], if the person's membership, application for membership, service, application for service, or obligation to serve in the uniformed services is *a motivating factor* in the employer's action, *unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service.*[37]

Contrary to the City's position in this case, the decision rendered last year by the Federal Circuit Court in ***Sheehan v. Department of the Navy***,[38] expressly stated that "[t]he procedural framework and evidentiary burdens set out in § 4311 . . . are *different* from those in discrimination cases under Title VII. . . ."[39] Instead, the proper test for determining whether the Act has been violated is the so-called "but for" test, in which the employee is required to make an initial showing that his military service is at least "'*a* motivating or substantial factor in the employer's action,' upon which the employer must then prove, by a preponderance of the evidence, that the action would have been taken despite the protected status."[40] The term

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[36] § 4303(2).

[37] § 4311(c)(1) (Emphasis added).

[38] 240 F.3d 1009 (Fed.Cir.2001).

[39] ***Id.*** at 1014 (Emphasis added).

[40] ***Id. See also*** 38 U.S.C. § 4311(c) (Emphasis added).

"'motivating factor' means that if the employer was asked at the moment of the decision what its reasons were and if it gave a truthful response, one of those reasons would be the employee's military position or related obligations."[41] In other words, a plaintiff's military position and related obligations would be a motivating factor if the employer "relied upon, took into account, considered, or conditioned its decision on [the employee's] military-related absence."[42]

In order to avail itself of the affirmative defense available under the Act, the employer must do more than "merely showing that at the time of the decision it was motivated only in part by a legitimate reason."[43] Rather, the employer must show, by a preponderance of the evidence, "that its legitimate reason, standing alone, would have induced it to make the same decision."[44] In that regard, the court in ***Sheehan*** explains, that "[t]his applies to both so-called 'dual [or mixed] motive' cases (in which the employer defends on the ground, that, even if an invalid reason played a part in the adverse action, the same action would have been taken in the absence of the invalid reason) and so-called 'pretext' cases (in which the [employer] defends on the ground that it acted only for a valid reason)."[45] This is the burden of proof analysis used by at least one district court within the Fifth Circuit, and the one followed in this case.[46]

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[41] ***Robinson v. Morris Moore Chevrolet-Buick,*** 974 F.Supp. 571, 575 (E.D.Tex.1997) (citing ***Price Waterhouse v. Hopkins,*** 490 U.S. 228, 250, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989)).

[42] ***Id.*** at 576.

[43] ***Id.***

[44] ***Id.***

[45] 240 F.3d at 1014. ***See also Robinson,*** 974 F.Supp. at 576.

Finally, it should be noted that Section 4311 is a congressional response to the United States Supreme Court decision in ***Monroe v. Standard Oil Co.***[47] In that case, the Court held that USERRA's antecedent, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, "was enacted for the significant purpose of protecting the employee/reservist against discrimination like discharge and demotion, motivated *solely* by reserve status."[48] Congress amended the statute in 1994 to provide that a violation occurs when a person's membership in the uniformed services is *a motivating factor*, even if not the sole factor.[49] "Stated otherwise, Congress intended to lessen, but not eliminate, a veteran's [or reservist's] obligation to show that the employer's adverse decision was related to his service in the armed forces."[50] Thus, to

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[46] ***Id. See also Gummo v. Village of Depew***, 75 F.3d 98, 106 (2d Cir.), ***cert. denied***, 517 U.S. 1190, 116 S.Ct. 1678, 134 L.Ed.2d 780 (1996); and ***Curby***, 216 F.3d at 556.

[47] 452 U.S. 549, 101 S.Ct. 2510, 69 L.Ed.2d 226 (1981).

[48] ***Id.*** at 559, 101 S.Ct. 2510 (Emphasis added). ***See also Pignato v. American Trans Air, Inc.***, 14 F.3d 342 (7th Cir.1994) (holding that in order to establish employer liability in mixed-motive cases, the impermissible motive must be the controlling reason for the adverse action), ***cert. denied***, 512 U.S. 1205, 114 S.Ct. 2675, 129 L.Ed.2d 810 (1994).

[49] ***See Newport v. Ford Motor Co.***, 91 F.3d 1164, 1167 (8th Cir.1996) (noting that USERRA was enacted in response to ***Monroe*** and changed ***Monroe's*** "sole cause" standard to a "motivating factor" standard).

[50] ***Id. See also Gummo***, 75 F.3d at 106 (where the court in expressly rejecting *Monroe*, opted instead to evaluate § 4311(b) (formerly, § 2021(b)(3)) by using the scheme of burden of proof allocations approved by the United States Supreme Court in ***NLRB v. Transportation***

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the extent that the City follows the "sole cause" standard enunciated in ***Monroe,*** that standard has been repealed by § 4311 of the Act and is no longer applicable.[51] It should be emphasized that USERRA was "designed to improve, rather than replace the VRRA,"[52] and it is "to be broadly construed and strictly enforced."[53]

Since the plaintiffs challenge a number of the City's policies and practices, the existence of which are not in dispute, the application of the "but for" test in this case differs from the typical adverse employment action case. While the City maintains that the plaintiffs have not established that the City's actions were "motivated," at least in part, by their membership or obligation for service in the uniformed services, the required motivation needed by plaintiffs to satisfy their burden of proof is met by the existence of the policies and practice themselves. Plaintiffs' claims involve policies and practices, which by their very nature, attach consequences to a reservist's absence for military duty. For example, and as discussed more fully below, according to the collective bargaining agreement ("CBA") between the City and the firefighters' union:[54]

Management Corp., 462 U.S. 393, 401, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983)).

[51] It should be noted that the right denied to the reservist in ***Monroe,*** that is, to arrange his work hours so that he could both fulfill his reservist obligations and put in a full forty hours of work, is now protected. *See* § 4303(2).

[52] ***See Novak v. Mackintosh,*** 919 F.Supp. 870, 877 (D.S.D.1996); and ***Gummo,*** 75 F.3d at 106-07.

[53] ***Yates,*** 145 F.3d at 1484-85; and ***Petersen v. Department of Interior,*** 71 M.S.P.R. 227, 234-35 (1996) (discussing relevant legislative history).

[54] According to Plaintiffs' "Statement of Undisputed Facts," the permanent, uniformed members of the City's Fire Department are

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military leave, unlike vacation and other related leave, will not count towards the "twenty-seven hour cap" on loss of overtime leave under the Federal Labor Standards Act ("FLSA"); the use of military leave in the same cycle as vacation leave means that the vacation leave will not count towards the "twenty-seven hour cap;" and absences for military leave in excess of fifteen days per year, disqualify a firefighter from receiving "bonus day" leave. Reservists assigned to the EMS division who cannot accept an unscheduled overtime opportunity because they are off duty on military leave are treated as if they had refused the opportunity, unlike non-reservists who are off duty for continuing education or Department training. No reservist, in either the Fire Fighting division or the EMS division, is given the opportunity to "make up" for the unscheduled overtime or upgrading opportunities missed when they are away on military duty. Plaintiffs are disparately impacted, and indeed discriminatorily penalized, by these policies and practices when compared to those employees who need not be absent from work to perform military reserve duty. According to the express language of the challenged employment practices or policies, the City cannot persuasively argue that it did not "take into account," "consider," or "condition its decision" on its employees' military-related absences.

Before analyzing the specific policies and practices challenged in this case, it should be noted that the City

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represented by the International Association of Fire Fighters, Local 624 (the Union), which serves as their exclusive bargaining agent. Since 1974, the Union and the City have executed a series of collective bargaining agreements governing the firefighters' wages, hours, and other terms and conditions of employment. Docket Entry 56, Plaintiffs' Appendix, at ¶ 26.

incorrectly argues that the plaintiffs' claims fall within § 4316 of the Act on the ground that the benefits at issue are seniority-based. While it is undisputed that unscheduled overtime is distributed in both the Fire Fighting and EMS divisions in order of seniority, a policy not objected to by plaintiffs, § 4316 is inapplicable to this case. According to the provision's express language, it only applies to a person "who is *reemployed* under this chapter . . . ,"[55] or "who is absent '*on furlough or leave of absence.*'"[56] Section 4316 is specifically tailored to apply to a reservist or veteran returning to employment from active duty rather than reservists, like the plaintiffs in this case, who have been away for relatively short periods of time to fulfill their standard drilling and training requirements.[57] As discussed in ***Carney v. Cummins Engine Company, Inc.***,[58] the anti-discrimination provisions (now § 4311(a-c), formerly, § 2021(b)(3)) were specifically added "to protect the rights of reservists which had been found to be inadequately protected" under the provision cited by the City (§ 4316, formerly § 2024(d)).[59] The ***Carney*** court, in that regard, further stated:

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[55] 38 U.S.C. § 4316(a) (Emphasis added)

[56] § 4316(b) (Emphasis added).

[57] According to plaintiffs' "Statement of Undisputed Facts," typically, a reservist or guardsman performs minimum requirements of drilling one weekend a month and annual training for two weeks a year. He may also be ordered to perform additional duties, meet mandatory educational requirements, or may volunteer for additional duties. Docket Entry 56, Plaintiffs' Appendix, at ¶ 30.

[58] 602 F.2d 763 (7th Cir.1979), ***cert. denied***, 444 U.S. 1073, 100 S.Ct. 1018, 62 L.Ed.2d 754 (1980).

[59] ***Id.*** at 766.

> Contrary to defendant's contention, it is not "inconceivable" that Congress could have intended to grant reservists greater protection than veterans returning from active duty. That is the clear import of Section [4311], and it is not illogical to extend to reservists some protection, such as the overtime opportunities missed here, that would simply not be practicable for the longer-term absences of veterans.[60]

In light of the plain language of the statute and the City's failure to cite legal authority in support of its position that § 4316 is the applicable provision in this case, the court will analyze plaintiffs' challenges to the City's policies and practices under the broad anti-discrimination provision of the Act, § 4311.

2. The Challenged Policies and Practices

In determining whether a "right," or "benefit of employment" has been denied in violation of USERRA, courts are usually guided by the three criteria outlined in ***Allen v. United States Postal Service:***[61]

> First, the courts have considered whether ["the benefit of employment"] is one generally granted to all employees in the workplace, and whether it

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[60] ***Id. See also Lott v. Goodyear Aerospace Corporation***, 395 F.Supp. 866, 868 (N.D.Ohio 1975) (where the court held that the legislative history does not support the argument that the benefits of employment must be afforded only as to any person on a furlough or leave of absence. "Rather, the legislative history indicates that reservists who are required to attend weekly drills will be entitled to the same treatment afforded their coworkers not having such military obligations.").

[61] 142 F.3d 1444 (Fed.Cir.1998).

was denied [. . .] because of absence of military service. Several courts have ruled that a generally available benefit cannot be denied because of military duty.[62]

Second, the courts have considered whether the person absent on military duty was treated the same way as if the person had remained at work. These rulings recognize that although for some statutory purposes persons returning from military duty correctly are treated as if they had been on furlough or leave of absence, under [§ 4311] they must not be disadvantaged by failure to treat them as if they had been present at work.[63]

Third, the courts have considered whether it was reasonably certain that the benefit would have

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[62] ***Id.*** at 1446 (citing ***Waltermyer v. Aluminum Company of America,*** 804 F.2d 821, 824-25 (3d Cir.1986) (reservist was entitled to holiday pay despite requirement that employee be present on days before and after the holiday); ***Carney,*** 602, F.2d at 766-67 (reservist was entitled to overtime opportunities he missed while on military duty)). While the court in ***Allen*** refers to the "sole cause" standard as enunciated in ***Monroe,*** the court has omitted the reference from the quoted paragraph as it is not a correct statement of the law. Besides referencing the wrong standard, the court in ***Allen*** does provide useful guidance.

[63] ***Id.*** at 1446-47 (citing ***West v. Safeway Stores, Inc.,*** 609 F.2d 147, 150 (5th Cir.1980) ("collective bargaining agreement must be construed as if (reservist) was constructively present at work."); and ***Carlson v. New Hampshire Dept. of Safety,*** 609 F.2d 1024, 1027 (1st Cir.1979) (where the court, in stating that it was not sufficient to treat reservist like any employee on leave, deemed a shift change as a "constructive demotion.")), ***cert. denied,*** 446 U.S. 913, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980).

> accrued to the employee but for the absence of military service.[64]

With these criteria in mind, the court will proceed to analyze each of the City's policies and practices challenged by plaintiffs in this case.

a. The "Twenty-Seven" Hour Cap on Lost FLSA Overtime[65]

With respect to overtime for firefighters assigned to the Firefighting division, the collective bargaining agreement in effect since 1988 has provided, in relevant part:

> Under a twenty-one (21) day cycle, each employee shall lose no more than twenty-seven (27) hours of overtime pay per year as a result of scheduled vacation leave being counted as productive time for F.L.S.A. purposes.[66]

In the 1995 collective bargaining agreement, the following provision was added:

> For the purpose of computing eligibility for F.L.S.A overtime and application of the twenty-seven (27) hour limit in this paragraph, all other

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[64] ***Id.*** at 1447 (citing ***Teamsters Local Union 612 v. Helton,*** 413 F.2d 1380, 1383-84 (5th Cir.1969)).

[65] This policy is described in detail in plaintiffs' "Undisputed Statement of Facts," Docket Entry 56, Appendix, at ¶¶ 49-57.

[66] Docket Entry 56, Plaintiffs' Appendix, at ¶ 49 and Agreed Exhibits A & B. The collective bargaining agreements in effect at times material to this case are the following: the agreement in effect from October 1, 1988 through November 15, 1995; the agreement in effect from November 14, 1995 through September 30, 1999, and the current agreement, in effect since September 30, 1999. Plaintiff's Appendix, at ¶ 27; and Amended Joint-Stipulated Facts, Docket Entry 61, at ¶ 29.

> types of leave will take priority over vacation leave in application of this provision (i.e., when vacation leave and any other form of leave is used in the same 21 day cycle, the loss of F.L.S.A. overtime shall not apply to the twenty-seven (27) hour maximum loss).[67]

This provision also appears in the 1999 agreement.[68]

It is undisputed that firefighters assigned to the Firefighting division who work twenty-four hour shifts have overtime built into their work schedules.[69] For purposes of overtime compensation under the Fair Labor Standards Act ("FLSA"),[70] instead of having their work hours measured by the conventional forty hour per week standard, firefighters are subject to a special set of work hour standards designed to accommodate the twenty-four hour shifts.[71] The Secretary of Labor, through regulation, has set the maximum number of hours which firefighters can work, depending on the length of the FLSA work period used by the employer.[72] Pursuant to the CBA, the City's Fire Department operates on a twenty-one day FLSA work period.[73] Thus, according to the federal regulations, the maximum number of hours which firefighters can work in a twenty-one day period without earning overtime is 159. The City's firefighters, however, are scheduled to work 168 hours; and as such, they are entitled to receive nine hours of pay at an overtime rate every twenty-one days.[74] According to the plaintiffs, this is known in the Fire Department as "FLSA overtime."[75] Both, the FLSA and the CBA generally require that an employee "actually work" the hours if they are to receive the overtime rate.[76] As plaintiffs state: "[i]t is axiomatic that if an employee takes some sort of leave during the work period, he does not earn an overtime rate."[77]

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[67] This provision is found in Article XIV, Section 3 of the agreement. Docket Entry 56, Plaintiffs' Appendix, at ¶ 50 and Agreed Exhibits A & B; and Amended Joint-Stipulated Facts, at ¶ 42. ***See also*** Plaintiffs' Exhibit 5. Fire Department's Division Order on "FLSA Guidelines," dated July 1, 1997.

[68] Docket Entry 56, Agreed Exhibit B.

[69] It is undisputed that the firefighters assigned to the EMS division are *not* detrimentally affected by this policy. This policy is only challenged by those plaintiffs/firefighters who are assigned to the Fire Fighting division since they are on a work schedule requiring the regular payment of overtime compensation. ***See*** Docket Entry 56, at 2 & fn. 2.

[70] 29 U.S.C. § 201 ***et seq***.

[71] Docket Entry 56, at 10. ***See*** 29 U.S.C. § 207(k) and 29 C.F.R. § 553.200 ***et seq***.

The Fire Department, however, through provisions in the CBA, provides some critical exceptions to this requirement, the result of which employees receive compensation at an overtime rate when they have not actually worked the requisite amount of hours.[78] The City and the

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[72] *Id.*

[73] Docket Entry 56, Plaintiffs' Appendix, at ¶ 47 and Docket Entry 61, Amended Joint-Stipulation of Facts, at ¶ 32.

[74] Docket Entry 61, at ¶ 33; and Plaintiffs' Appendix, Docket Entry 56, at ¶ 48.

[75] Docket Entry 56, at 10.

[76] Docket Entry 56, at 11.

[77] *Id.* (and legal authority cited therein).

[78] *Id.* and Plaintiffs' Appendix, at ¶¶ 50-51 and Agreed Exhibits A & B; and Docket Entry 61, at ¶¶ 42-43. The Plaintiffs further note that through its own policy, the Fire Department treats firefighters who are off work on various types of administrative leave do not lose their FLSA overtime at all, even though they are not actually performing their regular duties and are not working the fifty-six hours per week. For

(Continued on following page)

Union have negotiated a benefit whereby once a firefighter loses twenty-seven hours of FLSA overtime in a given year (*i.e.,* once he loses the overtime in three FLSA work periods) to the taking of vacation or vacation-related leave, his loss of FLSA overtime is capped. When he takes additional vacation leave that year, even though he is not actually working, he will still receive his FLSA overtime as if he were. Vacation leave, floating vacation shifts (that is, a vacation shift taken apart from vacation leave scheduled in advance and typically, in groups of four twenty-four hour shifts), bonus day leave, perfect attendance leave, and vacation leave used as Family Medical Leave Act leave, all count towards the "twenty-seven" hour cap.[79] Military leave inexplicably does not.[80] The plaintiffs, in this regard, maintain that while "the impact of absences due to vacation is blunted . . . the impact of absences due to military service is not."[81]

Military reservists are, without question, bound to be absent from work more often than their non-reservist counterparts. "The essence of reserve duty in this context is absence from work."[82] Reservists must be off work to train a minimum of one weekend per month and two weeks per year, and many have significantly more extensive time

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instance, a firefighter assigned to play in the Department's band or sent on recruiting trips or attending specialized training, will still receive his FLSA overtime. Docket Entry 56, at 11 and fn. 10 (citing to Plaintiffs' Exhibit 5, at 2).

[79] ***Id.*** and Plaintiffs' Exhibit 5, at 1.

[80] ***Id.***

[81] Docket Entry 64, at 9.

[82] ***West,*** 609 F.2d at 149.

commitments.[83] Any use of their allotted fifteen days per year of military leave will take them out of their FLSA overtime for the cycle in which they use it.[84] Depending on how their reservists duties are scheduled, a factor which more often than not they have little to no control over, they face the possibility of losing the FLSA overtime in at least some of the seventeen FLSA cycles per year.[85]

The plaintiffs also take issue with the related provision in the CBA which provides that if vacation leave is taken in conjunction with another type of leave, such as military leave, the vacation leave taken will *not* count towards the 27 hour cap.[86] Accordingly, when a reservist is forced to use vacation leave in the same FLSA cycle as military leave, either because the reservist is using his own vacation leave so that he will have enough time off to fulfill a training requirement, or because his military duty happens to fall in the same cycle as his pre-scheduled vacation, he loses the benefit of the cap.[87] For plaintiffs,

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[83] Docket Entry 56, at 12 & fn. 11 (citing ***Green v. Spartan Stores, Inc.***, 112 L.R.R.M. (BNA) 2099 (W.D.Mich.1982), for the proposition that it is immaterial if the reservist is absent for the purpose of fulfilling his minimal requirement, is absent because he is ordered to perform additional service, or has initiated the additional service himself); and Plaintiffs' Appendix, at ¶ 30.

[84] ***Id.*** According to plaintiffs, and undisputed by the City, both Texas law and City policy require that a reservist be paid for fifteen days of military leave a year. Docket Entry 64, at 7.

[85] ***Id.*** at 12.

[86] Docket Entry 56, Plaintiffs' Appendix, at ¶ 55.

[87] ***Id.*** Plaintiffs further point out that this is very likely to occur, as typically firefighters have four vacation groups of four shifts each per year. These are scheduled by seniority, prior to the beginning of the year. "Not only does the firefighter have limited control over when he is scheduled for reservist duty, he also has limited control over when he is

(Continued on following page)

even the use of their allotted military leave not only means that the reservist will automatically lose their FLSA overtime; their use of military leave also limits their ability to take advantage of the twenty-seven hour cap in the use of vacation leave. Plaintiffs contend that in order to counter the disadvantage posed to them by this provision, they sometimes choose, albeit not required by the City, to forego the use of their allotted military leave altogether, and instead exhaust their own vacation leave or even trade time with other firefighters in order to fulfill their service requirements.[88]

It is evident that, through these employment policies and practices, the plaintiffs are being denied the same benefit otherwise available to their non-reservist counterparts, namely the twenty-seven hour cap on lost FLSA overtime per year, which translates into the payment of overtime compensation when overtime hours are not actually worked. Plaintiffs are indeed at a disadvantage for no other reason other than their military reserve status.[89]

Contrary to defendant's position, the plaintiffs in this case are not seeking any preferential treatment. Rather, they seek to be treated the *same* as their non-reservists

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scheduled for vacation, and no flexibility for rescheduling his vacation groups to avoid the impact of this provision." *Id.* at fn. 12.

[88] *Id.* at 13.

[89] ***See e.g., Waltermyer v. Aluminum Company of America (ALCOA),*** 804 F.2d 821, 825 (3d Cir.1986); ***Hanning v. Kaiser Aluminum,*** 95 L.R.R.M. (BNA) 2964 (E.D.La.1977); and ***Kidder v. Eastern Air Lines,*** 469 F.Supp. 1060, 1066-67 (S.D.Fla.1978), cases decided pre-USERRA in which the courts held that military reservists were entitled to holiday pay which was available to all employees who were present the week in which the holiday fell.

counterparts.[90] While the City attempts to compare plaintiffs with those co-workers who are away from work on some other non-military leave of absence, that is not the proper comparison. "The mandated standard of comparison, is not, as defendants would maintain, to 'those coworkers away on non-military leave of absence' but to the more embrasive class of 'coworkers not having (reserve) obligations.'"[91] Indeed, the Fifth Circuit stated in ***West v. Safeway Stores, Inc.***,[92] that the Act requires that employers, in applying collective bargaining agreements which grant a benefit of employment based on "presence" rather than on "hours actually worked," should treat reservists as if they were "constructively present" during their reserve duty.[93]

The City does not deny the adverse impact of its policy concerning the twenty-seven hour cap on lost FLSA overtime on plaintiffs. It does argue, however, that its actions do not violate USERRA because it has not singled out military leave for discriminatory treatment. For instance, the City posits that other types of leave are also excluded from being counted towards the twenty-seven hour cap (*i.e.*, sick leave, emergency leave, light duty, etc.). This is not a convincing argument because:

> [i]t is immaterial that non-military employees of defendant on leave of absence would not be entitled to overtime opportunities [. . .] since the right of reservists to such opportunities is governed by statute rather than by collective bargaining

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[90] Docket Entry 56, at 9.

[91] ***Carlson***, 609 F.2d at 1027 (citations omitted).

[92] 609 F.2d at 150.

[93] ***Id.***

> agreement. Nor does it matter that affording plaintiff relief might conflict with the collective bargaining agreement between defendant and the Union.[94]

Consequently, the City's only affirmative defense raised in this case, namely that its actions were instituted pursuant to a collective bargaining agreement, a defense frequently raised by employers in benefit cases, is one that has been uniformly rejected by the courts.[95] Further, the City's affirmative defense fails for a more subtle reason due to the nature of the plaintiffs' policies and practices claims. As the court in ***Robinson v. Morris Moore Chevrolet-Buick*** explained, for the defense to be successful, the employer must show its legitimate reason, standing alone, would have induced it to make the same decision.[96] It should also be noted that since the collective bargaining agreement accepted by the City imposes the penalties for the military leave absences, the City is hard-pressed to show that it would have nevertheless imposed the penalties, irrespective of the absences.

Moreover, the City maintains there is no requirement that a military reservist use scheduled vacation time to perform his military service and that some of the plaintiffs have "voluntarily decided to incur this loss."[97] In making this argument, however, the City ignores the fact that the plaintiffs incur a loss when they use their allotted fifteen days of military leave. Further, the undisputed evidence establishes that while the City provides fifteen days of paid military leave, the reservists are frequently required to be absent more often, in which case the only paid leave available for them to use is vacation leave.[98] Plaintiffs do not deny that they will sometimes choose to take vacation leave, or to trade time with another firefighter, in lieu of using military leave in order to avoid the penalty associated with the use of military leave. They maintain though, that even if the avoidance of this penalty in this manner may be a voluntary act (*i.e.*, not imposed by the City), it is nevertheless a direct consequence of the City's discriminatory practices.[99] The court agrees.

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[94] ***Carney***, 602 F.2d at 766 (citing ***Kidder***, 469 F.Supp. at 1066-67; and ***Lott v. Goodyear Aerospace Corp.***, 395 F.Supp. 866, 869-70 (N.D.Ohio 1975); and ***McKinney v. Missouri-Kansas-Texas R. Co.***, 357 U.S. 265, 268-69, 78 S.Ct. 1222, 2 L.Ed.2d 1305 (1958)).

[95] ***Id.*** See Docket Entry 60, at 8 and 10.

[96] 974 F.Supp. at 576.

[97] Docket Entry 60, at 6.

Based on the court's analysis of the exclusion of military leave from the twenty-seven hour cap under the ***Allen*** criteria, the court concludes that it violates USERRA. The availability of the twenty-seven hour cap is a "benefit of employment" granted to all employees, especially so since all employees receive and are required to take vacation leave. They are thus guaranteed to benefit (*i.e.*, receive overtime compensation they would not otherwise be entitled to receive) from the cap once they have lost twenty-seven hours of FLSA overtime. The plaintiffs, because of their military reserve status, are not treated as though they are "constructively present" at work; indeed, they are not treated as well as if they were on vacation. The court thus, finds, that plaintiffs have met their burden of showing that their military status was at least a motivating or substantial factor considered by the City in its implementation of the twenty-seven hour cap. It is undisputed that plaintiffs would have benefitted from the policy but for their military obligations. Further, there is no genuine issue of material fact with respect to the City's inability to affirmatively establish that its actions in implementing this practice "would have been taken" in the absence of plaintiffs' military reserve status.[100]

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[98] Docket Entry 56, Plaintiffs' Appendix, at ¶ 40.

[99] Docket Entry 64, at 10 and fn. 6.

Because plaintiffs' claim for "loss of straight-time for hours worked claim,"[101] is connected to plaintiffs' instant claim for lost FLSA overtime compensation, and as plaintiffs' state: "[it] is an adverse effect suffered every time a reservist loses FLSA overtime to the taking of military leave,"[102] the court finds it appropriate to reserve judgment on the merits of plaintiffs' claim at this time and address it during the damages phase of the case.

b. Unscheduled Overtime Compensation and Upgrading/Training Opportunities

i. *Unscheduled Overtime*

In addition to the FLSA overtime built into their work schedules, firefighters assigned to both the Firefighting and EMS divisions have the opportunity to work unscheduled overtime, that is, extra hours worked in addition to the regular work shift, for which a firefighter would receive time and one-half his regular rate of pay. Plaintiffs allege that since the overtime increments are typically for increments of twelve hours each, this can amount to a significant amount of money, and as a result, the opportunities are highly coveted.[103]

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[100] Particularly, the City has failed to establish that similar provisions have been upheld under USERRA.

[101] Docket Entry 56, at 19-20; docket entry 64, at 11-12. The City's briefing on the issue is found in Docket Entry 60, at 8-9; and Docket Entry 63, at 5-7.

[102] ***Id.*** at 19 & fn. 17.

It is undisputed that the distribution of overtime operates somewhat differently in the Firefighting and EMS divisions. For instance, in the EMS division, if a firefighter cannot be reached or is not available when the overtime opportunity is offered, as when he is on reservist duty, then he is treated as though he refused the opportunity and his name is "crossed off" that particular overtime list.[104] In the Firefighting division, if a firefighter is not available to work overtime, his name is skipped on the list but he remains eligible to be offered another opportunity from that list, provided that he is not on long-term leave, in which case he is skipped altogether.[105] Significantly, neither policy requires that reservists be "made up" on the overtime opportunities they miss when they are off from work performing reserve duty. The firefighters in both divisions, because of their military reserve duties, stand at a disadvantage, when compared with their non-reservist counterparts, for being scheduled for and receiving overtime compensation.[106] Similar policies, denying military reservists the benefit of earning or "be made" available overtime opportunities, have been struck down as discriminatory.

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[103] Docket Entry 56, Plaintiffs' Appendix, at ¶ 69. For a detailed description of the City's unscheduled overtime policy, the court relies on the undisputed paragraphs in Plaintiffs' Appendix, at ¶¶ 69-74.

[104] Docket Entry 56, at 16 & fn. 15.

[105] Plaintiffs had admitted that the policy applicable to the EMS division is harsher than the one applied in the Firefighting division. ***Id.*** In addition, the City has acknowledged that while firefighters assigned to the EMS division are not allowed to make up overtime opportunities missed, there is one exception to this policy, albeit applied in the same manner to reservists and non-reservists alike. Docket Entry 60, at 11. The exception applies when an EMS employee is attending continuing education training. According to the deposition testimony of Alfred Montez, EMS employees who attend continuing education training are allowed to make up the overtime opportunity missed because the EMS division considered employees in continuing education training, as not on any type of leave, but merely performing other work duties. ***Id.*** at Exhibit D, at 4-13.

For example, in ***Carney v. Cummins Engine Co.***,[107] the Seventh Circuit Court of Appeals reasoned that the employer's practice of treating reservists's unavailability to work overtime as tantamount to a refusal to work was a violation of the VRRA.[108] The court in ***Carney***, in response to the defendant's contention that the plaintiff was seeking preferential treatment by demanding the right to make up missed overtime, stated that the plaintiff did not voluntarily decline the opportunity to work overtime and indeed would have worked overtime but for his absence due to his military duty. The employer was thus ordered to permit the reservist to make up missed overtime opportunities, or alternatively compensate him.[109] Significantly, in support of its holding, the ***Carney*** court stated: "It is immaterial that non-military employees of defendant on leave of absence would not be entitled to overtime opportunities [. . .] since the right of reservists to such opportunities is governed by statute rather than by the collective bargaining agreement."[110]

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[106] ***See West***, 609 F.2d at 150 ("reservists must be treated as if they were 'constructively present' during their reserve duty. . . . ").

[107] 602 F.2d 763 (7th Cir.1979), ***cert. denied***, 444 U.S. 1073, 100 S.Ct. 1018, 62 L.Ed.2d 754 (1980).

[108] ***Id.*** at 766-67.

[109] ***Id.***

Likewise, the district court in ***Lott v. Goodyear Aerospace,***[111] in upholding the statutory right of an employee to the same overtime opportunities as non-reservist employees, stated:

> Carrying out its congressional purpose [what is now Section 4311] entitles a reservist, who cannot take advantage of overtime work because of his military duty, to be equated with a person who is able to work overtime [internal citation omitted]. Since the latter person draws overtime pay, unless he voluntarily chooses not to exercise the opportunity, the reservist should not be marked up for overtime that he could not take advantage of because of his military duty.[112]

Accordingly, following the ***Carney*** and ***Lott*** decisions, the court rules that the City is liable under USERRA as plaintiffs have established, as a matter of law, that their military reserve status is a motivating factor in the City's decision to deny them the opportunity to "make up" for any lost overtime. The City's defenses, *i.e.,* that plaintiffs are seeking preferential treatment, that they must be "present" in order to receive overtime payment, and that they are treated the same as other similarly-situated non-reservist firefighters, are not legally or factually sufficient for the City to meet its burden of establishing that it would have "taken the same action," irrespective of the military reserve status.

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[110] ***Id.*** at 766 (internal citations omitted).

[111] 395 F.Supp. 866, 869-70 (N.D.Ohio 1975).

[112] ***Id.*** at 870. While the court acknowledges the contrary ruling in ***Breeding v. TRW, Inc., Ross Gear Div.***, 477 F.Supp. 1177, 1184 (M.D.Tenn.1979) (where the court held that an employee unavailable to work overtime on account of his military training was not entitled to an alternative opportunity under the Act), the court considers the Seventh Circuit's ruling in ***Carney*** a more sound and accurate statement of the law. Further, the reasoning in ***Breeding*** is weakened by its extensive reliance on ***Monroe,*** the outcome of which would have been different under USERRA as the Act now expressly protects the reservist's right to select his work hours. 38 U.S.C. § 4303(2). ***See*** discussion at 11 and fn. 45, ***supra.***

ii. Upgrading/Training Opportunities[113]

As in the claim to "make up" overtime missed because of military duty, the dispositive issue with regards to the upgrading and/or training opportunities is whether the City is required by USERRA to allow absent reservists to "make up" any opportunities for upgrading and/or training missed while on duty. In view of the liberal standard applicable to USERRA claims, the answer to that question is "Yes." The court finds instructive the case of ***Yates v. Merit Systems Protection Board.***[114] In that case, the Federal Circuit Court held that the Merit Systems Protection Board had jurisdiction to address plaintiff's claim under USERRA, namely, that she had been denied the opportunity to "make up" the two weeks of training and her thirty-day evaluation she missed while on reserve duty.[115] The court reasoned that each of these claims is properly viewed as a "benefit of employment" because each was an "advantage" or "status" of her probationary employment with her employer.[116]

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[113] Under Article XVI of the CBA, an employee who works in a higher classification shall be paid at the higher classification rate of pay for actual time worked in that classification. In the Fire Department, this is also known as "upgrading." Opportunities for upgrading are generated through the absence of a firefighter of a superior rank. Docket Entry 56, Plaintiffs' Appendix, at ¶ 75. The court, in its analysis of plaintiffs' claim for missed upgrading and/or training opportunities, relies on the description provided by plaintiffs' "Statement of Undisputed Facts," ¶¶ 75-81.

[114] 145 F.3d 1480 (Fed.Cir.1998).

The plaintiffs rely on the individual circumstances of plaintiff Captain Anthony Rogers, as the highest ranked plaintiff, as representative of the type of unequal treatment and/or disadvantages suffered by all the named-plaintiffs, in terms of the upgrading and/or training missed because of their military duties.[117] Whether or not plaintiffs have enough evidence to prove an injury based on this claim under USERRA will be left to the fact-finder to decide during the damages phase of this case. At this juncture of the case, plaintiffs have shown that USERRA guarantees them these opportunities.

c. "Bonus Day" Leave and "Perfect Attendance" Leave

Bonus days and perfect attendance leave are two other benefits available to employees in the Fire Department under the CBA. They are available to reservists only on a reduced basis. Beginning with the 1995 CBA, Fire Department employees were and are eligible to earn two additional leave days (one additional shift), for each six months of "perfect attendance." This benefit is called "Bonus Day Leave."[118] They also receive two extra incentives, referred to in the CBA as "perfect attendance leave" (or "PAL"), entitling an employee to use two shifts of vacation leave outside his regularly scheduled vacation groups (a floating vacation shift or "FVS"), providing some flexibility for taking time off, and allowing conversion of one shift of accrued sick leave to vacation leave. The relevant provisions of the CBA which discuss these benefits are found in Article XVII of the CBA. According to Article XVII, Section 4 of the 1999 CBA:

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[115] *Id.* at 1484-85.

[116] *Id.* at 1485 (citing 38 U.S.C. § 4303(2)).

[117] Docket Entry 56, at 18.

[118] Docket Entry 56, Plaintiffs' Appendix, at ¶ 58.

> B. Employees not working for one of the following reasons are not eligible to receive the two (2) days perfect attendance bonus:
>
> 1. sick leave,
>
> 2. line of duty injury ["LOD"] (provided that the use of LOD leave for a portion of a shift, as to those employees that return to work in the following shift, shall not be a disqualification under this section),
>
> 3. emergency leave,
>
> 4. *military leave in excess of fifteen (15) days in a calendar year,*
>
> 5. leave without pay, and
>
> 6. suspensions.
>
> C. The types of leave that will not adversely affect the employee's entitlement to the perfect attendance bonus are:
>
> 1. LOD (provided that the use of LOD leave for a portion of a shift, as to those employees that return to work on the following shift),

> 2. Properly scheduled and authorized vacation days, holidays, compensatory time, bereavement leave, administrative leave,[119] and
>
> 3. time restored by the commissioner or an arbitrator (hearing examiner).[120]

Based on the express terms of the quoted paragraphs, if a firefighter takes military leave in excess of fifteen days (the allotment of paid leave which City employees receive),[121] he will not qualify for bonus day leave.

Section 3 of Article XVII of the CBA contains the provisions concerning perfect attendance leave. It provides, in relevant part:

> A. Any employee who achieves perfect attendance over a 6 month period shall be entitled to utilize two (2) additional shifts of accrued vacation leave outside of scheduled vacation periods plus may convert one shift of sick leave for use as a floating vacation shift in accordance with the provisions of this section, hereinafter to be called "perfect attendance leave". Perfect Attendance Leave shall be used during the subsequent six (6) months.

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[119] The term "perfect attendance" appears to be a term of art under the CBA because it is not used in its literal meaning as firefighters taking vacation, holidays, compensatory time, bereavement leave and administrative leave, among others, will still qualify as having "perfect attendance." In other words, the use of those periods of leave do not count against "perfect attendance." Docket Entry 56, at 15.

[120] Docket Entry 56, Agreed Exhibits A & B.

[121] Plaintiffs object to the term "military leave in excess of 15 days." According to the plaintiffs, "[t]here is no military leave in excess of 15 days; after 15 days are used, what the firefighter will have to be using is his own vacation leave." Docket Entry 56, at 16.

> D. "Perfect attendance" shall mean that the employee has not utilized any of the following types of leave:
>
> 1. sick leave,
>
> 2. emergency leave (provided that the use of bereavement leave, although taken on an emergency leave basis, shall not be a disqualification under this section),
>
> 3. line of duty leave (provided that the use of LOD leave for a portion of a shift, as to those employees that return to work on the following shift, shall not be a disqualification under this section),
>
> 4. leave without pay, and
>
> 5. suspensions.[122]

Whether the use of military leave in excess of 15 days disqualifies a reservist from receiving perfect attendance leave is not as clear as in "bonus day leave," considering that the above-quoted provisions do not explicitly include military leave in the list of disqualifying leaves. Plaintiffs, however, have produced as summary judgment evidence a Fire Department's "FLSA and Leave Policy" document, uncontroverted by the City, which expressly provides that military leave *over* fifteen days disqualifies a firefighter from receiving PAL benefits.[123] A determination of whether any of the named-plaintiffs have been deprived of perfect attendance leave as a result of this policy will be considered in the damages portion of this case. To the extent that plaintiffs allege that the City is liable under USERRA because it has "taken into account," or "considered," plaintiff's military reserve status in offering to them the Bonus Day and Perfect Attendance Leaves only on a reduced basis, the court finds that plaintiffs have met their burden.

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[122] Docket Entry 56, Agreed Exhibits A & B.

[123] *Id.* at Exhibit 13.

As an affirmative defenses [sic], the City again argues that: "military reservists are treated similarly to non-reservists who miss work because of sick leave, LOD leave, emergency leave, leave without pay and suspensions,"[124] and that "the actions at issue were instituted pursuant to [the CBA]."[125] As discussed earlier in the context of the twenty-seven hour cap on lost FLSA overtime, those are not viable defenses and fail as a matter of law.[126] The proper group for purposes of comparing plaintiffs, who may have been on military reserve duty longer than the allotted fifteen days, are those co-workers who were present at work because they did not have military obligations. It is immaterial that the provisions have been implemented as a result of a CBA, because plaintiffs' entitlement to the same full benefits of Bonus Day and Perfect Attendance leaves enjoyed by their non-reservist counterparts, is protected by § 4311 of USERRA.[127]

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[124] Docket Entry 60, at 10.

[125] ***Id.***

[126] ***See*** discussion on page 842 and related footnotes, *supra.*

[127] The City has again failed to present any summary judgment evidence and/or argument showing that similar provisions have been upheld under USERRA.

F. Conclusion

Based on the foregoing, it is hereby ***ORDERED*** that plaintiffs' cross motion for summary judgment (Docket Entry 56) is ***GRANTED,*** with the exception of their claim concerning straight loss time as that claim will be addressed during the damages phase of the case. Defendant's cross-motion for summary judgment (Docket Entry 60) is ***DENIED*** in its entirety. For the reasons articulated in this Order, Defendant's objections to certain exhibits attached to plaintiffs' summary judgment motion (Docket Entry 62) are ***DENIED.*** The court, by a separate order, will set the damages portion of this case for a bench trial.

SIGNED this 28 day of March, 2002

Orlando L. Garcia
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-50588

ANTHONY ROGERS; ET AL

Plaintiffs

ANTHONY ROGERS; RICHARD MORALES;
VENTURA CALDERON, JR; ANDREW L ALMAZAN;
ROBERT J DE LEON; ROLANDO CESAR GARZA;
ROBERT A GEARHART; ISIDRO MEDINA, JR;
TIMOTHY L MENCHACA; EMILIO M MONTES;
BRUCE R MOORE; NATHANIEL OAKMAN;
ANTONIO RIVAS; JEFFERY J ZAVALA;
GEORGE W RANDALL

Plaintiffs-Defendant

v.

CITY OF SAN ANTONIO

Defendant-Appellant

- - - - - - - - - - - - - - - - - - - -

Appeal from the United States District Court
for the Western District of Texas, San Antonio

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ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion 12/02/04, 5 Cir., ___, ___ F.3d ___)

(Filed Jan. 27, 2005)

Before JONES and DENNIS, Circuit Judges.*

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

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* Judge Pickering was a member of the original panel but retired from the Court on December 8, 2004 and, therefore, did not participate in this decision.